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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 387

RECONSTRUCTION FINANCE CORPORATION,
PETITIONER

vs.

BANKERS TRUST COMPANY, TRUSTEE

No. 388

RECONSTRUCTION FINANCE CORPORATION,
PETITIONER

vs.

BANKERS TRUST COMPANY, TRUSTEE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1942
CERTIORARI GRANTED OCTOBER 26, 1942

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[fol. 1] (Notice of Appeal Filed in District Court.)

(Filed July 28, 1941.)

In the District Court of the United States,
Eastern Division, Eastern Judicial
District of Missouri.

In the Matter of

St. Louis-San Francisco Railway
Company,

Debtor.

In Proceedings
for the
Reorganization
of a Railroad.
No. 7004

Notice is hereby given that Reconstruction Finance Corporation, intervener in the above entitled proceeding, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the order of Honorable George H. Moore, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, entered herein on June 30, 1941, finding that section 77 (c) (12) of the Bankruptcy Act is not applicable to the Bankers Trust Company, Trustee, with respect to its claim for compensation, and allowing compensation and expenses to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, in the total sum of \$26,792.16, on the petition of Bankers Trust Company, Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, for compensation and expenses rendered by it and its attorneys.

C. M. CLAY,
Washington, D. C.,

ROBERT D. EVANS,
St. Louis, Missouri;

Attorneys for Reconstruction Finance
Corporation.

[fol. 2] (Docket Entry Showing Mailing of Notice of Appeal
Filed in District Court to Counsel for Appellee.)

July 28, 1941.

Notice of appeal of Reconstruction Finance Corporation, intervenor, to United States Circuit Court of Appeals, 8th Circuit from order of Court entered herein June 30, 1941, allowing compensation and expenses to Bankers Trust Co., as corporate trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Ry. Co., bearing attached thereto acknowledgment of service by the respective attorneys for Bankers Trust Co. and J. M. Kurn et al Trustees of St. Louis-San Francisco Ry. Co., debtor, filed.

[fol. 3]

(Agreed Statement of Facts.)

(Filed October 10, 1941.)

1. In accordance with the provisions of Rule 76 of the Rules of Civil Procedure, it is agreed by and between Reconstruction Finance Corporation and Bankers Trust Company, as Corporate Trustee under Refunding Mortgage of Kansas City, Fort Scott & Memphis Railway Company, for the purpose of the appeal taken by the Reconstruction Finance Corporation from Order No. 290, dated June 30, 1941, that the following are the facts of the case and show how the question arose and was decided in the District Court.

2. The St. Louis-San Francisco Railway Company, a Missouri railroad corporation, engaged in interstate commerce (hereinafter sometimes referred to as "Frisco"), on May 16, 1933, filed its petition under the provisions of Section 77 of the Bankruptcy Act in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which said petition was by the Court approved May 17, 1933. Thereafter the Court appointed James M. Kurn and John G. Lonsdale Trustees who, as such, have since continued to act as Trustees in the operation of such railroad; that part of the system of railroad of the St. Louis-San Francisco Railway Company is what formerly was the Kansas City, Fort Scott & Memphis

Railway Company. The Bankers Trust Company, a corporation organized and existing under the banking laws of the State of New York, is the successor Corporate Trustee under the Refunding Mortgage covering the line of rail- [fol 4] road and certain other property of the said Fort Scott & Memphis Railway Company.

3. December 30, 1940, the District Court handed down its order respecting petitions for compensation and expenses, being Order No. 242, as follows:

Order #242, Shown on Folio Page 8.

4. On February 15, 1941, Bankers Trust Company, as Corporate Trustee, filed its Petition No. 266, dated February 11, 1941, for compensation and expenses, as follows:

Petition #266, Shown on Folio Page 20.

5. On February 15, 1941, Bankers Trust Company, as Corporate Trustee, filed its Petition No. 267, dated February 13, 1941, for allowance of compensation and expenses, which said petition was by the Clerk transmitted to the Interstate Commerce Commission for the fixing of maximum limits.

6. Said petition included all of Petition No. 266 and the following:

Petition #267, Shown on Folio Page 98.

7. Thereafter the Court on oral motion by counsel for Bankers Trust Company set Petition No. 266 for hearing on April 4, 1941. On that day the petition coming on for argument was opposed by counsel for the Frisco Trustees and by the Reconstruction Finance Corporation who had been permitted to intervene in the St. Louis-San Francisco reorganization proceedings on the 7th day of July, 1934, by Order No. 82A, reading as follows:

Order 82-A, Shown on Folio Page 103.

8. The positions taken at the hearing on April 4, 1941, by the Trustees of the St. Louis-San Francisco Railway Company and by Reconstruction Finance Corporation and taken by brief filed by Reconstruction Finance Corporation were: first, that those of the services rendered by

[fol. 5] Bankers Trust Company and its counsel for which an allowance of compensation and expenses is petitioned which were rendered during the course of Section 77 proceedings were rendered "in connection with the proceedings and plan"; second, that Section 77 (c) (12) of the Bankruptcy Act as amended includes all applications for allowance of compensation and expenses in connection with the proceedings and plan and by express language includes such allowances to "trustees under indentures"; and, third, that Section 77 (c) (12) is a valid enactment and constitutional and that the constitutional questions were prematurely raised.

9. Thereafter on June 30, 1941, the District Court entered its order, being Order No. 290, allowing said compensation and expenses, said order being as follows:

Order #290, Shown on Folio Page 104.

10. This appeal followed.
11. (Here copy notice of appeal with filing date.)
12. (Here copy statement of points to be relied on.)

RECONSTRUCTION FINANCE CORPORATION,

By RUSSELL L. SNODGRASS,
ROBERT D. EVANS.

BANKERS TRUST COMPANY, as Corporate
Trustee under Refunding Mortgage of Kansas,
City, Fort Scott & Memphis Railway Company,

By RHODES E. CAVE,

Approved:

GEO. H. MOORE,
U. S. District Judge.

[fol. 6] (Statement of Points to be relied on filed in U. S. District Court.)

(Filed October 10, 1941.)

Comes now Reconstruction Finance Corporation and, pursuant to Rule 75(d) of the Rules of Civil Procedure, files this its statement of the points to be relied on on its appeal from the order of the Honorable George H. Moore, dated June 30, 1941, allowing compensation and expenses to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, being Order No. 290. Said points on appeal are as follows:

1. The Court erred in holding that paragraph (c)(12) of Section 77 of the Bankruptcy Act as amended was not applicable to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, dated August 23, 1901, with respect to its said claim for compensation and expenses as such Corporate Trustee;

2. The Court erred in granting the Bankers Trust Company an allowance for services rendered and for expenses, including attorneys' fees, prior to the fixing of maximum limits by the Interstate Commerce Commission as required by paragraph (c)(12) of Section 77 of the Bankruptcy Act as amended;

3. The Court erred in not finding that the services of the Bankers Trust Company and its attorneys in connection with the proceedings and plan were within the provisions of Paragraph (c)(12) of Section 77;

[fol. 7] 4. The Court erred in granting an allowance to the Bankers Trust Company, as Corporate Trustee, for services which were in connection with the proceedings and plan in the absence of the fixing of a maximum by the Interstate Commerce Commission;

5. The Court erred in not denying the petition of the Bankers Trust Company for allowance of compensation;

6. The Court erred in making an allowance of compensation on the petition of Bankers Trust Company in view

of the fact that the Court had theretofore transmitted to the Interstate Commerce Commission an identical petition covering the same services for the fixing of maximum limits which had not been acted upon by the Interstate Commerce Commission.

RECONSTRUCTION FINANCE CORPORATION,

By **RUSSELL L. SNODGRASS,**
ROBERT D. EVANS,
HENNINGS, GREEN, HENRY & EVANS,
1130 Boatmen's Bank Building,
St. Louis, Missouri.

Dated at St. Louis, Missouri, this 9th day of October, 1941.

[fol. 8] Order Fixing the Time Within Which Objections to the Plan of Reorganization Certified by the Interstate Commerce Commission May Be Filed Herein, and Within Which Petitions for Allowance of Compensation or Expenses May Be Filed, and Fixing a Date for the Hearing on Objections to the Plan and Providing for the Giving of Due Notice to All Parties in Interest.

[Order No. 242.]

(Filed December 30, 1940.)

The Interstate Commerce Commission by Report and Order dated July 6, 1940, having approved a Plan of Reorganization of the Debtor, and by Supplemental Report [fol. 9] and Order dated November 16, 1940, having modified and approved as modified said Plan of Reorganization; and the Interstate Commerce Commission having thereafter certified to this Court the Plan of Reorganization so approved:

Now, Therefore, pursuant to the provisions of Section 77 of the Bankruptcy Act of the United States, it is hereby Ordered:

1. All parties in interest, whether or not they may have intervened herein or become formal parties to the record

of this proceeding, having any objections to said Plan of Reorganization shall file detailed and specific objections in writing to the Plan and their claims, if any, for equitable treatment in the Office of the Clerk of this Court in the United States Court House in the City of Saint Louis, Missouri, on or before February 1, 1941, and shall serve copies thereof on or before said date as hereinafter directed.

2. All petitions for allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred either under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act or otherwise, shall be filed in triplicate in the office of the Clerk of this Court in the United States Court House in the City of St. Louis, Missouri, on or before February 15, 1941, and shall be served on or before said date as hereinafter directed. Said petitions shall cover such services rendered and expenses incurred up to and including January 31, 1941; provided, however, that the filing of such petitions shall be without prejudice to subsequent petitions for allowance for compensation for services rendered or expenses incurred [fol. 10] after said date. The provisions of paragraph 5 of this Order shall not be applicable to petitions for allowances heretofore filed with this Court and forwarded to the Interstate Commerce Commission.

3. Applications for counsel fees and disbursements of counsel may be made by the petition of counsel or by the petition of the party or parties by whom counsel have been employed or by joint petition.

4. Upon the filing of each such petition for allowances under clause (12) of subsection (c) of Section 77, and each affidavit filed with any such petition or pursuant to paragraph 5 hereof, the Clerk shall forthwith forward one of the triplicates thereof to the Interstate Commerce Commission for the fixing of a maximum limit or limits on the amount or amounts of the allowances to the petitioner or petitioners from the estate of said Debtor.

5. Each such petition for allowances under Section 77 (c) (12) shall identify the petitioner or petitioners; specify the period of time during which services have been ren-

dered; state briefly the general character of the services and the amount of the allowance requested for such services; and give the total of the expenses for which reimbursement is sought, with a brief description or classification of the major items.

Not less than twenty (20) days prior to the date fixed by the Commission for the hearing on any such petition, the petitioner shall file with the Clerk of this Court, in triplicate, an affidavit or affidavits (unless such affidavit or affidavits shall have been filed with the petition), which shall contain, as nearly as may be,

[fol. 11] (a) a full and detailed statement of the services for which compensation is sought, the date or dates or approximate period of time when they were rendered; and the approximate time devoted thereto;

(b) appropriate detail with respect to all expenses, including transportation and subsistence expenses.

Each such petition for allowances, not under Section 77 (c) (12), shall contain, as nearly as may be, the general matter and the detail hereinabove in this paragraph 5 required in respect of petitions and affidavits for allowances under Section 77 (c) (12).

Any affidavit so filed shall be deemed a part of the petition to which it relates. A copy of any such affidavit shall be served as hereinafter directed prior to the filing thereof with the Court.

6. Any and all objections to said Plan of Reorganization and any and all claims for equitable treatment and any and all petitions for allowance of compensation and expenses which may be filed herein pursuant to this Order are set for hearing in Court Room No. Two (2) of this Court at Saint Louis, Missouri, at 10:00 A. M. on March 19, 1941, or as soon thereafter as conveniently possible, at which time any party in interest may appear and be heard in support of or in opposition to such objections and such claims for equitable treatment and such petitions for allowance.

7. The Trustees herein shall forthwith give notice of the entry of this Order (a) by mailing a copy of this Order by

registered mail, postage prepaid, to the Interstate Commerce Commission and to all parties in interest in these [fol. 12] proceedings or their attorneys, a list containing the names and addresses of said parties in interest or their attorneys being hereto annexed and marked Schedule A; and (b) by publishing a Notice substantially in the form of Schedule B hereto annexed in each of the following newspapers not later than January 7, 1941:

In St. Louis, Missouri, in the St. Louis Globe-Democrat, in the St. Louis Post-Dispatch, and in the St. Louis Star-Times;

In New York, New York, in the New York Times, and in the Wall Street Journal;

In Boston, Massachusetts, in the Boston Record;

In Chicago, Illinois, in the Chicago Tribune;

In Birmingham, Alabama, in the Birmingham News;

In Memphis, Tennessee, in the Memphis Commercial Appeal;

In Kansas City, Missouri, in the Kansas City Star;

In Springfield, Missouri, in the Springfield Leader and Press;

In Cape Girardeau, Missouri, in the Southeast Missourian;

In Oklahoma City, Oklahoma, in the Oklahoman;

In Tulsa, Oklahoma, in the Tulsa World and the Tulsa Tribune;

In Wichita, Kansas, in the Wichita Beacon;

In Ft. Smith, Arkansas, in the Fort Smith Southwest American;

In Jonesboro, Arkansas, in the Jonesboro Sun;

In Pensacola, Florida, in the Pensacola Journal;

In Tupelo, Mississippi, in the Tupelo Journal.

Said Trustees shall file in these Proceedings proper proof of the serving of copies of this Order and of the publication of said Notice as herein directed. ✓

8. Copies of objections to the Plan, of petitions for [fol. 13] allowance and of affidavits to such petitions for

allowance shall be served by the parties filing same on the Trustees herein and on all parties in interest as set forth in Schedule A hereto annexed, by mailing copies thereof, postage prepaid, to said parties or their counsel.

GEO. H. MOORE,

United States District Judge.

Dated, December 30th, 1940.

[fol. 14]

Schedule A.

Parties in Interest and Counsel.

Larkin, Rathbone & Perry,

70 Broadway, New York, N. Y.

Counsel for Central Hanover Bank and Trust Company and Daniel K. Catlin, Trustees under the Prior Lien Mortgage of St. Louis-San Francisco Railway Company.

Fordyce, White, Mayne, Williams & Hartman,

506 Olive Street, St. Louis, Missouri.

Counsel for Central Hanover Bank and Trust Company and Daniel K. Catlin, Trustees under the Prior Lien Mortgage of St. Louis-San Francisco Railway Company.

Milbank, Tweed & Hope,

15 Broad Street, New York, N. Y.

Counsel for The Chase National Bank of the City of New York and John A. Aid, Trustees under the Consolidated Mortgage of St. Louis-San Francisco Railway Company.

Nagel, Kirby, Orrick & Shepley,

319 North Fourth Street, St. Louis, Missouri.

Counsel for The Chase National Bank of the City of New York and John A. Aid, Trustees under the Consolidated Mortgage of St. Louis-San Francisco Railway Company.

White & Case,

14 Wall Street, New York, N. Y.

Counsel for Bankers Trust Company and Walter W. Smith, Trustees under the Refunding Mortgage of The Kansas City, Fort Scott and Memphis Railway Company.

[fol. 15] Bryan, Williams; Cave & McPheeters,
Boatmen's Bank Building, St. Louis, Missouri.

Counsel for Bankers Trust Company and Walter W. Smith, Trustees under the Refunding Mortgage of The Kansas City, Fort Scott and Memphis Railway Company.

Bingham, Dana & Gould,
One Federal Street, Boston, Massachusetts.

Counsel for Old Colony Trust Company, Trustee under the General Mortgage of Kansas City, Memphis and Birmingham Railroad Company.

Eliot, Blayney & Bedal,
506 Olive Street, St. Louis, Missouri.

Counsel for Old Colony Trust Company, Trustee under the General Mortgage of Kansas City, Memphis and Birmingham Railroad Company.

Hunton, Williams, Anderson, Gay & Moore,
1003 Electric Building, Richmond, Virginia.

Counsel for John W. Stedman et al., Prior Lien Mortgage Bondholders' Committee.

Taylor, Chasnoff & Willson,
1930 Boatmen's Bank Building, St. Louis, Missouri.

Counsel for John W. Stedman et al., Prior Lien Mortgage Bondholders' Committee.

Cravath, deGersdorff, Swaine & Wood,
15 Broad Street, New York, N. Y.

Counsel for Frederick H. Ecker et al., Consolidated Mortgage Bondholders' Committee.

Carter & Small,
418 Olive Street, St. Louis, Missouri.

Counsel for Frederick H. Ecker et al., Consolidated Mortgage Bondholders' Committee.

[fol. 16] Davis Polk Wardwell Gardiner & Reed,
15 Broad Street, New York, N. Y.

Counsel for James H. Brewster, Jr., et al., The Kansas City, Fort Scott and Memphis Railway Company Refunding Mortgage Bondholders' Committee.

Charles P. Williams,
220 North Fourth Street, St. Louis, Missouri.

Counsel for James H. Brewster, Jr., et al., The Kansas City, Fort Scott and Memphis Railway Company Refunding Mortgage Bondholders' Committee.

C. M. Clay,

Counsel for Reconstruction Finance Corporation, Washington, D. C.

Hennings, Green, Henry & Hennings,
Boatmen's Bank Building, St. Louis, Missouri.

Counsel for Reconstruction Finance Corporation.

William J. Kane,

Secretary and Counsel of The Railroad Credit Corporation,
Maryland Trust Building, Baltimore, Maryland.

Miller, Boston & Owen,

15 Broad Street, New York, N. Y.

Counsel for Committee of Preferred Stockholders of St. Louis-San Francisco Railway Company.

Chadbourne, Wallace, Parke & Whiteside,

25 Broadway, New York, N. Y.

Counsel for Committee of Common Stockholders of St. Louis-San Francisco Railway Company.

[fol. 17] William V. Hodges,

20 Pine Street, New York, N. Y.

Counsel for St. Louis-San Francisco Railway Company, Debtor.

Jesse McDonald,

506 Olive Street, St. Louis, Missouri.

Counsel for St. Louis-San Francisco Railway Company, Debtor.

Secretary of the Treasury,
Washington, D. C.

(Designated by executive order No. 7263, Jan. 4, 1936, to act in respect of interest or claims of United States.)

Frank A. Thompson,
705 Olive Street, St. Louis, Missouri.

Special Counsel for John G. Lonsdale, Co-Trustee,
St. Louis-San Francisco Railway Company.

E. G. Nahler,
906 Olive Street, St. Louis, Missouri.

General Solicitor for J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company.

[fol. 18]

Schedule B.

In the
District Court of the United States
For the Eastern District of Missouri,
Eastern Division.

In the Matter of

St. Louis-San Francisco Railway
Company, a Missouri Corporation,
Debtor.

In Proceedings
for the
Reorganization
of a Railroad.
No. 7004.

To All Parties in Interest in the Aforesaid
Proceedings:

Pursuant to an Order entered December ..., 1940, in the
above entitled Proceedings, Notice is hereby given that:

1. The Interstate Commerce Commission has certified to
the Court, pursuant to the provisions of Section 77 of the
Bankruptcy Act, a Plan of Reorganization of St. Louis-
San Francisco Railway Company, Debtor, copies of which
are on file with said Commission and the Court.

2. All parties in interest, whether or not they may have
intervened in said Proceedings, or become formal parties
to the record thereof, having any objections to such Plan
[fol. 19] of Reorganization, shall file detailed and specified
objections to the Plan and their claims, if any, for equita-
ble treatment, in writing in the office of the Clerk of the
above named Court, at the United States Court House in
the City of St. Louis, Missouri, on or before February 1,

1941, and shall serve copies thereof on or before said date, on all parties to, and interveners in said Proceedings.

3. All petitions for allowance for compensation for services rendered or for expenses incurred, in the form and as otherwise required in said order, shall be filed in triplicate with the Clerk of said Court on or before February 15, 1941, and petitioners shall serve copies thereof, on or before said date, on all parties to, and interveners in said Proceedings.

4. 10:00 a. m., on March 19, 1941, has been fixed as the time and Court Room No. Two (2) of the Court in the United States Court House in the City of St. Louis, Missouri, as the place, for hearing all parties in interest in support of, or in opposition to, any and all objections to said Plan of Reorganization and any and all claims for equitable treatment and any and all petitions for allowance that may be filed herein pursuant to said Order.

By Order of the Court:

J. M. KURN,
JOHN G. LONSDALE,
Trustees.

Dated December 30, 1940.

[fol. 20] Petition of Bankers Trust Company as Corporate Trustee under the Refunding Mortgage of The Kansas City, Fort Scott & Memphis Railway Company for Compensation and Expenses.

(Filed February 15, 1941.)

[Petition for Allowance No. 266.]

To the Honorable Judges of the District Court of the United States, for the Eastern District of Missouri:

The Petition of Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage, dated August 23rd, 1901, of The Kansas City, Fort Scott & Memphis Railway Company, respectfully shows:

1. That Petitioner (hereinafter sometimes called the

"Corporate Trustee") is and has been since March 24, 1903, a corporation duly organized and existing under the Banking Laws of the State of New York, duly empowered to act as trustee under corporate mortgages, and is Successor Corporate Trustee under the Refunding Mortgage (hereinafter sometimes called the "Mortgage") made by The Kansas City, Fort Scott & Memphis Railway Company to The Mercantile Trust Company and William H. [fol. 21] Thompson, as Trustees, a copy of which Mortgage and the Supplements thereto were filed with this Court on December 29, 1933, and the Corporate Trustee begs leave to refer to the same and to the provisions thereof with the same force and effect as if the same were fully set forth herein.

2. That the Mortgage was duly executed, acknowledged and delivered in all respects in conformity with law, and upon the execution and delivery thereof, was properly and duly recorded in each jurisdiction in which the properties described in the granting clauses of the Mortgage were located.

3. That the Mortgage secures Forty-seven Million, Five Hundred Thirteen Thousand Dollars (\$47,513,000) aggregate principal amount of Refunding Mortgage Gold Bonds, due October 1, 1936 (hereinafter sometimes called the "Bonds"), of which approximately Twenty-five Million Eight Hundred Thirty-five Thousand Dollars (\$25,835,000) principal amount is outstanding in the hands of the public, and Twenty-one Million Six Hundred Seventy-eight Thousand Dollars (\$21,678,000) principal amount is held under pledge under the Consolidated Mortgage dated March 1, 1928 of the St. Louis-San Francisco Railway Company (hereinafter sometimes called the "Debtor") to The Chase National Bank of The City of New York, Successor Corporate Trustee to Interstate Trust Company, and John A. Aid, as Trustees.

4. That the Mortgage is a first lien upon the main line of railroad between Kansas City and Memphis and upon the equipment, franchises and other properties, real, personal and mixed, at any time appurtenant to the railways and property subject to the lien of the Mortgage, and is a second lien upon the main line between Memphis and

Birmingham, subject only to the prior lien thereon of a certain Mortgage dated March 1, 1894, executed by Kansas City, Memphis & Birmingham Railroad Company to Old Colony Trust Company, as Trustee, under which, [fol. 22] upon information and belief, there are presently issued and outstanding the aggregate principal amount of Six Million Nine Hundred Twenty-five Thousand One Hundred Seventy Dollars (\$6,925,170) of bonds of said Kansas City, Memphis & Birmingham Railroad Company, of which Three Hundred Ninety-nine Thousand Five Hundred Dollars (\$399,500) principal amount are pledged with the Corporate Trustee under the Mortgage.

That the following securities are now pledged with the Corporate Trustee subject to the terms of the Mortgage:

\$399,500 Kansas City, Memphis & Birmingham R.R. Co.,
5% Income Bonds (stamped), due March 1,
1934.

\$2,463,000 Kansas City, Memphis & Birmingham R.R. Co.,
5% Income Bonds (assented-cancelled), due
March 1, 1934.

\$257,000 Kansas City, Memphis & Birmingham R.R. Co.,
5% Income Bonds (unassented-cancelled),
due March 1, 1934.

7,150 Bonnaville & Southwestern R.R. Co., Common
Stock.

17,754 Kansas City, Clinton & Springfield Ry. Co.,
Capital Stock.

59,748 Kansas City, Memphis & Birmingham R.R. Co.,
Common Stock.

29,995 Kansas City and Memphis Ry. & Bridge Co.,
Common Stock.

2,280 Tyrone Central R.R. Co., Common Stock.

That the Corporate Trustee now holds cash deposited with it subject to the terms of the Mortgage in the amount of Two Hundred Sixty-five Thousand Three Hundred Fifteen and 01/100 Dollars (\$265,315.01), of which One Hundred Five Thousand Five Hundred Three and 36/100 [fol. 23] Dollars (\$105,503.36) represents accumulated proceeds of properties released from the lien of the Mortgage,

and One Hundred Fifty-nine Thousand Eight Hundred Eleven and 65/100 Dollars (\$159,811.65) represents accumulated income received upon the collateral held subject to the terms of the Mortgage.

5. That Article Twenty-third of the Mortgage provides as follows:

"The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

That the Mortgage also provides that in the event of default in the payment of interest continuing for three (3) months or default in the payment of principal (which defaults in payment of interest and principal have occurred and still exist), the Trustees have the right to sell all and singular the mortgaged premises under the power of sale contained in the Mortgage or by virtue of judicial proceedings and that in the event of any such sale, and as provided by Article Seventeenth of the Mortgage, the proceeds of sale, together with any other sums which may then be held by the Trustees or be payable to them under the Mortgage shall be applied as follows:

"1. to the payment of the costs, expenses, fees and other charges of such sale, and a reasonable compensation to the Trustees, their agents and attorneys, and to the payment of all expenses and liabilities incurred and advances or disbursements made by the Trustees, and to the payment of all taxes, assessments or liens prior to the lien of this indenture, except any taxes, assessments or other superior liens subject to which such sale shall have been made."

6. That the above entitled proceeding was initiated by the filing with this Court on or about May 16, 1933 of a [fol. 24] petition by the Debtor, St. Louis-San Francisco Railway Company; that said petition was approved by this Court on or about May 17, 1933; and that these proceedings thereupon superseded the then existing Receivership

Proceedings under which James M. Kurn and John J. Lonsdale were Receivers.

7. That the period of time covered by this Petition during which services have been rendered by the Corporate Trustee extends not only from on or about November 1, 1932, when Receivers were appointed in the Receivership Proceedings but also during the period prior to that date when the officers of the Debtor and representatives of various security holders were developing the Plan of Reorganization dated July 6, 1932 and were endeavoring to place such Plan in effect, to and including January 31, 1941, a period of approximately nine years.

8. That during the period referred to in the preceding paragraph, the responsibility of the Corporate Trustee to protect the mortgaged security entrusted to it and the rights of the holders of the Bonds secured thereby has required constant diligence on its part in following the proceedings herein, the proceedings had before the Interstate Commerce Commission in connection with this Reorganization and otherwise; that in the exercise of its duties the Corporate Trustee has been guided by the fact that a Bondholders' Protective Committee for holders of the Bonds was organized on or about December 26, 1933 and was authorized to represent, during the greater part of these proceedings, the holders of about sixty percent (60%) of the Bonds outstanding in the hands of the public, which Committee, on leave granted, intervened generally herein and has been active throughout these proceedings; that the Corporate Trustee has at all times cooperated with said Bondholders' Protective Committee in an endeavor to eliminate all unnecessary duplication of effort; that the [fol. 25] existence of such Committee, however, has not relieved the Corporate Trustee of its responsibility to protect the mortgaged security entrusted to it and the rights of the holders of the Bonds secured thereby.

9. That in order to be properly informed as to matters arising from time to time in these proceedings, and to more adequately and efficiently perform its duties as Corporate Trustee, officers of the Corporate Trustee studied the relationships existing with respect to the properties subjected to the lien of the Mortgage and the other prop-

erties of the Debtor and also the various reports from time to time prepared by the Debtor's Trustees covering the allocation of revenues and expenses for the years 1934, 1936 and 1937; to the lines of railway upon which the Mortgage is a lien; that in this connection it was possible for the Corporate Trustee to take advantage of the detailed studies of the operating and financial situation of the Debtor which were then available in the Analysis Department of Bankers Trust Company.

10. That in the conduct of its duties as Corporate Trustee, the services and work performed and steps taken have at all times been under the supervision of R. G. Page, a Vice President, and A. W. Bachman, an Assistant Vice President, of Bankers Trust Company; that R. G. Page has been employed in the Trust Department of Bankers Trust Company for more than thirty-five years and has been an officer of Bankers Trust Company for twenty-five years; that A. W. Bachman has been employed by Bankers Trust Company for more than seventeen years, during six years of which he was its senior Railroad Analyst; subsequently for the last four years he has been employed in its Trust Department, devoting a large part of his time to railroad mortgages under which Bankers Trust Company acts as Corporate Trustee and he has been an Assistant Vice President of the Trust Company for more than five years.

[fol. 26] 11. That in the performance of its duties as Corporate Trustee and as part of the services constituting the the subject matter of this Petition, the Corporate Trustee had to give special attention to the following matters, among others:

(a) In January, 1934, the Debtor's Trustees proposed to issue Trustee's Certificates in connection with an application for a loan to the Federal Emergency administration of Public Works. This required considerable attention on the part of the Corporate Trustee and its counsel, particularly in view of the fact that it was proposed to create a prior charge on the properties subject to the mortgage.

(b) Consideration of the annual budgets of the

Debtor's Trustees proposing expenditures for additions and betterments for the respective ensuing years. These annual budgets were reviewed and discussed with counsel and with representatives of the Bondholders' Protective Committee. The budget for the year 1938 required special attention because of the necessity of considering objections thereto made by The Prudential Insurance Company of America, the holder of a substantial amount of the Bonds.

(c) Consideration of the equipment from time to time subject to the Mortgage. On December 9, 1936, the Court authorized the Debtor's Trustees to retire and destroy certain obsolete equipment and directed that the net proceeds of sale of salvage of such equipment subject to the Mortgage should be deposited with the Corporate Trustee. Since the Corporate Trustee had no record of the nature and amount of the equipment subject to the Mortgage, it was incumbent upon it, in order adequately to protect the Mortgaged Estate, to ascertain the facts in this respect. These efforts of the Corporate Trustee culminated with the [fol. 27] furnishing to it on February 20, 1937 by the Debtor's Trustees of schedules of equipment showing their various classifications. These schedules were accepted by the Corporate Trustee with a reservation of all rights that it might have with regard to any replacement covenants contained in the Mortgage. Other items of obsolete equipment considered in this connection included the sales of equipment made pursuant to Orders in these proceedings Nos. 132, 155, 156, 185 and 201.

(d) Consideration of the abandonment of the Kansas City, Clinton and Springfield Branch. On February 3, 1937 a deposit of Thirty-seven Thousand One Hundred Ninety-four and 10/100 Dollars (\$37,194.10) was made with the Corporate Trustee with advice that this amount represented net proceeds of the sale of salvage from various abandoned branch lines subject to the Mortgage, made pursuant to Orders in these proceedings Nos. 16, 31 and 32. Since no indication was given the Corporate Trustee with respect to the breakdown of this amount, and since there was

no indication whether this amount represented all the net proceeds of the abandonment of the Kansas City, Clinton and Springfield Branch, it was necessary to carry on extensive correspondence with the chief accounting officer of the Debtor to obtain the requisite information. Largely as a result of these efforts, the Corporate Trustee was furnished on March 27, 1939 with a certificate with respect to the recovery of additional salvage in connection with the abandonment of said Branch, appraised at Sixty-three Thousand Nine Hundred Thirty-three and 37/100 Dollars (\$63,933.37). This certificate also showed the application of Three Thousand Three Hundred Three and 79/100 Dollars (\$3,303.79) of this appraised value to properties subject to the lien of the Mortgage, and, as a substitution for the balance of said appraised [fol. 28] value of Sixty Thousand Six Hundred Twenty-nine and 58/100 Dollars (\$60,629.58), the installation of the improvements on properties subject to the lien of the Mortgage at a cost of Seventy-two Thousand Four Hundred Eighty-three and 39/100 Dollars (\$72,483.39).

(e) Similar consideration of the sale of salvage as the result of the abandonment of the Current River and the Hunter Branches pursuant to the Order in these proceedings No. 172-A.

(f) Consideration of Petition No. 175 filed by the Corporate Trustee of the Prior Lien Mortgage of the Debtor to have 186 shares of the Arkansas Mine & Coal Company deposited with it as collateral under such Prior Lien Mortgage together with any dividends paid thereon and on Directors' qualifying shares.

(g) Consideration of the proposal of Debtor's Trustees to sell part of the property of the Gulf, Texas & Western Railway Company to the Chicago, Rock Island & Pacific Railway Company at its scrap value and the application of that value to the purchase of certain properties from the Chicago, Rock Island & Pacific Railway Company lying between Frisco Junction and Ardmore, Oklahoma.

(h) Consideration of proceedings instituted to re-

move cloud on title to lands in Crawford County, Kansas, as to which the Corporate Trustee was advised of the intention of Guy W. Von Schrlitz to interplead it as a party defendant. Apparently various properties subject to the lien of the Mortgage and involved in these proceedings had been sold but no proceeds of such sale had been deposited with the Corporate Trustee and no releases from the Mortgage lien were obtained in connection therewith. After thorough consideration of this matter with its counsel and with the Debtor's Trustees, the Corporate Trustee signified its willingness to execute a release in accordance [fol. 29] with an appropriate Order of this Court (being Order No. 205 entered July 13, 1939) upon the certification to it that property equivalent in value to the property released had been subjected to the lien of the Mortgage. This action was taken by the Corporate Trustee to avoid possible additional and expensive litigation which, in its judgment, could not result in benefit to holders of the Bonds commensurate with the expense and delay incident to such litigation.

(i) Examination and consideration throughout these proceedings of the records herein which to January 31, 1941, have totalled approximately 4,800 printed pages, which examination and consideration was necessary on the part of the Corporate Trustee since it was permitted to intervene in these proceedings only specially.

(j) The following is a brief enumeration of other matters directly affecting properties upon which the Mortgage was a lien and which required the attention of the Corporate Trustee:

(1) Sale of property in Jackson County, Missouri, pursuant to Order in these proceedings No. 167-A.

(2) Retirement and removal of roundhouse facilities at South Springfield, Missouri, pursuant to Order in these proceedings No. 180.

(3) Sale of property in Crittenden County, Ar-

kansas, pursuant to Order in these proceedings No. 195-A.

(4) Condemnation proceedings instituted with respect to lands in Crittenden County, Arkansas.

12. That upon the institution of the Receivership Proceedings above mentioned and the subsequent institution [fol. 30] of these proceedings further and additional duties devolved upon the Corporate Trustee, for the adequate protection of the Mortgage security and the rights of the holders of the Bonds. While the Receivers in the Receivership Proceedings aforesaid were not appointed until on or about November 1, 1932, considerable activity on the part of the Corporate Trustee was required in the months immediately preceding such appointment due to the efforts by officers of the St. Louis-San Francisco Railway Company and representatives of the various security-holders of that Company to develop a Plan of Reorganization. This culminated in the Plan dated July 6, 1932. As the result of further efforts by such officers and representatives modifications were made to such Plan and, as so modified, the Plan was filed with this Court on May 16, 1933 (the date the Debtor applied for reorganization under Section 77 of the Bankruptcy Act). Since this was one of the earliest proceedings under said Section 77, there was immediately presented to the Corporate Trustee the problem of its relationship to and duties in respect of proceedings of this character. All facts at that time available to the Corporate Trustee bearing on the finances and operations of the Debtor, in so far as they related to properties subject to the lien of the Mortgage, were carefully considered by its officers and with its counsel and with members of its staff experienced in railroad matters.

On April 1, 1933 the Debtor defaulted in payment of interest on the Bonds and the Corporate Trustee duly presented coupons maturing on that date at the office of the Debtor for payment, and made appropriate record when such coupons were not paid.

At the inception of these proceedings, questions were presented as to the necessity and desirability of intervention as a party to these proceedings by the Corporate

Trustee: The law in this respect was examined by counsel and was found to be somewhat confused by reason of conflicting decisions in other railroad reorganization matters. [fol. 31] Conferences were held, records were investigated and a petition was prepared and presented to this Court by counsel for the Corporate Trustee. On leave granted by this Court, such petition was filed December 29, 1933, to which petition and to all of the provisions thereof the Corporate Trustee begs leave to refer with the same force and effect as if the same were fully set forth herein. Thereafter and on March 29, 1934 leave was granted the Corporate Trustee by this Court to intervene specially in these proceedings. In petitioning for leave to intervene the Corporate Trustee also petitioned for the segregation and sequestration of the tolls, income, rents, revenues and profits of the property subject to the lien of the Mortgage for the benefit of the Trustees under the Mortgage and the holders of the Bonds and interest obligations secured thereby.

In accordance with the direction of this Court and on August 9, 1933, the Corporate Trustee filed a statement of the claim of the holders of the outstanding Bonds with April 1, 1933 and subsequent coupons, and at the same time took appropriate action to assure itself that the Trustee for the outstanding bonds issued under the above-mentioned mortgage of the Kansas City, Memphis and Birmingham Railway Company (of which Three Hundred Ninety-nine Thousand Five Hundred Dollars (\$399,500) principal amount are pledged as collateral with the Corporate Trustee), also took appropriate steps to file a similar claim on behalf of such bonds.

13. That on May 16, 1933, as above mentioned, the Debtor filed a Plan of Reorganization, dated July 6, 1932, as amended, with this Court and with the Interstate Commerce Commission, pursuant to Section 77 of the Bankruptcy Act. This Plan, which involved the properties conveyed to the Trustees under the Mortgage as security for the outstanding Bonds, required a study in detail by the Corporate Trustee. This plan was abandoned by the previous Reorganization Managers on December 20, 1933, [fol. 32] but was not withdrawn from the Interstate Com-

merce Commission where it remained under consideration until the approval of any plan was refused by Division 4 of the Interstate Commerce Commission in its report, dated March 17, 1937. On November 16, 1936 the Corporate Trustee filed a petition for leave to intervene in the proceedings before the Interstate Commerce Commission. This action was felt necessary in view of the fact that important and substantial changes in the outstanding obligations of the Debtor, including the Bonds, were proposed under the Plan theretofore filed. Leave to intervene was granted the Corporate Trustee by the Interstate Commerce Commission on November 28, 1936. The Corporate Trustee attended such proceedings before the Interstate Commerce Commission only for the purpose of keeping in touch with developments, considered by it and its counsel to be necessary adequately to perform its duties. In furtherance of the aforesaid purposes the Corporate Trustee studied the various plans and briefs in the proceedings before the Interstate Commerce Commission and consulted with the Bondholders' Protective Committee as to necessity for any action on its part. On November 19, 1937 the Debtor filed its Amended Plan of Reorganization and subsequently, on October 21, 1938, a plan was filed by three bondholders' committees, one of which was the Bondholders' Protective Committee representing the interests of holders of the Bonds. Each of these plans were reviewed by the Corporate Trustee. Hearings were held before the Interstate Commerce Commission on these proposed plans, and the Corporate Trustee, consistent with its aforementioned purposes, attended such hearings.

Prior to the hearings before the Interstate Commerce Commission in November, 1938, at the request of W. B. Stratton, one of the holders of the Bonds, officers of Corporate Trustee considered a further Plan of Reorganization prepared by Mr. Stratton and consulted with him in regard thereto.

[fol. 33] 14. That throughout the period here under consideration, the Corporate Trustee cooperated with the Bondholders' Protective Committee towards securing payment of past due interest on the Bonds by the Debtor. Certain payments were authorized by this Court. In con-

nection with the authorization of the first payment, the Corporate Trustee, at the request of the Bondholders' Protective Committee, had its counsel prepare a memorandum in support of the pending petition of such Committee for such interest payment.

From time to time this Court authorized payment of interest on the Three Hundred Ninety-nine Thousand Five Hundred Dollars (\$399,500) principal amount of bonds of the Kansas City, Memphis and Birmingham Railroad Company which the Corporate Trustee held in pledge as collateral under the Mortgage. Since these bonds were past due it was necessary that all such pledged bonds be stamped to evidence this payment. The proceeds of such interest payments were deposited with the Corporate Trustee in the Collateral Account under the Mortgage. The Corporate Trustee also studied the possible effect of the Statute of Limitations on matured bonds.

During the entire period of these proceedings the Corporate Trustee has from time to time consulted with holders of the Bonds, both by telephone and in person, regarding the status of these proceedings as they affected the Bonds, and also carried on extensive correspondence in reply to written inquiries received from holders of the Bonds.

15. That on information and belief, all of said services were rendered by the Corporate Trustee in the execution of the trusts created by the Mortgage and in the exercise of the powers and duties conferred upon the Corporate Trustee thereunder; that all of the services of the Corporate Trustee set forth or referred to herein were necessary to protect the Mortgaged Estate and the interests of the holders of the Bonds secured by the Mortgage; that all of said services have been rendered by the Corporate Trustee exclusively in its status as Corporate Trustee and with a view solely to preserve the Mortgaged Estate and to protect the rights of the holders of the Bonds; that any attendance by the Corporate Trustee at the proceedings before the Interstate Commerce Commission as aforesaid has been incidental to the accomplishment of its aforesaid purposes; and that said services, and the expenses incurred by the Corporate Trustee in

connection therewith as hereinafter-referred to, have not been rendered or incurred "in connection with the proceedings and plan" and have not been rendered or incurred for the benefit of the Debtor's general estate within the meaning of Section 77 (c) (12) of the Bankruptcy Act.

16. That Section 77 (c) (12) of the Bankruptcy Act provides in part as follows:

"(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, *to be paid out of the debtor's estate*, for the actual and reasonable expenses (including reasonable attorney's fees) incurred *in connection with the proceedings and plan* by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance *to be paid out of the debtor's estate* for the actual and reasonable expenses incurred *in connection with the proceedings and plan* and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. * * *" (Italics ours.)

17. That on information and belief said Section 77 (c) (12) of the Bankruptcy Act and the jurisdiction of the Interstate Commerce Commission thereunder do not apply to the Corporate Trustee in respect of the services and expenses constituting the subject matter of this Petition since said services and expenses have not been rendered [fol. 35] or incurred "in connection with the proceedings and plan" and have not been rendered or incurred for the benefit of the Debtor's general estate within the meaning of said Section 77 (c) (12).

18. That furthermore, the Corporate Trustee is advised by its New York counsel, and therefore alleges, that by virtue of the Mortgage and under the law it now has a prior lien or charge upon the Mortgaged Estate including the above mentioned deposited cash in the sum of Two Hundred Sixty-five Thousand Three Hundred Fifteen and 01/100 Dollars (\$265,315.01), for its reasonable compensa-

tion and expenses (which term "expenses", as used in this Petition, includes counsel fees).

19. That, on information and belief, there is nothing contained in said Section 77 which frees the property subject to the Mortgage from the lien and priority created by the provisions of the Mortgage, for the compensation and expenses of the Corporate Trustee, including reasonable legal fees and other expenses incurred and actually disbursed by it for the protection of the Mortgaged Estate or which fees the mortgaged property of the obligation to exonerate the Corporate Trustee from such expenses incurred and actually disbursed by it; that the Corporate Trustee claims that this Court has the duty and the power to decide the extent and validity and priority of the prior lien or charge afforded it by the provisions of the Mortgage, to determine the amount thereof and to charge the same, including counsel fees and other expenses, against the property subject to the Mortgage including the deposited cash held by the Corporate Trustee subject to the terms of the Mortgage; and that Section 77 does not provide that the Corporate Trustee must relinquish its lien or charge and priority and receive only such allowances as the Interstate Commerce Commission may limit, subject to the provisions of Paragraph (c) (12) of Section 77.

[fol. 36] 20. That, on information and belief, the Bankruptcy Act does not contain any provision empowering the Interstate Commerce Commission to adjudicate the amount of or fix the limits of or classify any claim of the Corporate Trustee with respect to reasonable compensation for its services or for the services of its attorneys and counsel in these proceedings or otherwise or to hear, determine, alter or limit the prior lien or charge given to the Corporate Trustee therefor by the contract provisions of the Mortgage, or the extent of such prior lien or charge.

21. That, on information and belief, the purpose and intent of Congress (as revealed in the words of Section 77 of the Bankruptcy Act to the effect that "within such maximum limits as are fixed by the Commission, the judge may make an allowance to be paid out of the Debtor's estate for the actual and reasonable expenses [including reasonable attorney's fees] incurred in connection with

the proceedings and plan" and by other words of said Section (c) (12) and by other portions of said Section 77, and as revealed in the practice thereunder) were and are to have referred to the Interstate Commerce Commission the consideration and determination of the question as to the amount of compensation to be awarded to all parties entitled to compensation or reimbursement out of the estate of the principal Debtor (meaning thereby unmortgaged assets and the equity of the principal Debtor in its mortgaged and pledged assets), and to have the maximum limits of such compensation and reimbursement fixed by the Interstate Commerce Commission on the basis of the anticipated cash position of the reorganized company, and the probable prospective earnings of the property in the light of its earnings experience and all other relevant facts, to the end that there shall be adequate coverage of such fixed charges by the probable earnings and to the end that the plan of reorganization shall be compatible with the public interest as these factors bear upon the ultimate question as to the fairness and practicability of a proposed plan of reorganization.

[fol. 37] 22. That, on information and belief, said Section 77 does not require or permit the Interstate Commerce Commission to take the further and additional step of determining or limiting the amount or extent of the reasonable value of the services of the Corporate Trustee and its expenses for counsel or other expenses lawfully incurred and disbursed by the Corporate Trustee and chargeable by the provisions of the Mortgage as a prior lien or charge upon the Mortgaged Estate.

23. That, on information and belief, if said Section 77 and paragraph (c) (12) thereof should be construed to authorize the Interstate Commerce Commission to place a limit upon the reasonableness of the expenses for compensation or otherwise incurred by the Corporate Trustee (secured by such prior lien or charge) and should be construed to authorize a determination of that issue based upon consideration of the exigencies of the Plan of Reorganization and the need of the principal Debtor for adequate cash working capital, or without reference to the contract provisions of Articles Seventeenth and Twenty-

third of the Mortgage, then said Section 77 is invalid, void and unconstitutional in whole or in part within the meaning of Article Five of the Amendments to the Constitution of the United States, in that the Corporate Trustee would be deprived of property without due process of law, and within the meaning of other provisions of said Article Five and within the meaning and intent of Section 1 of Article III of the Constitution of the United States vesting the judicial power of the United States in the Courts.

24. That this Petition does not include certain administration services for which the Corporate Trustee has been paid by the Debtor's Trustees.

25. That the reasonable value of the services of the Corporate Trustee is the sum of Ten thousand Dollars (\$10,000).

[fol. 38]. 26. That in connection with the performance of its duties under the Mortgage, the Corporate Trustee has employed as legal counsel Messrs. White & Case of New York City and Messrs. Bryan, Williams, Cave & McPheeters of St. Louis, Missouri, to advise it with respect to the performance of its said duties and services, and in that connection, from time to time, as deemed necessary in connection with such duties, to attend hearings in these proceedings and before the Interstate Commerce Commission. For such legal services said firm of White & Case and said firm of Bryan, Williams, Cave & McPheeters have rendered to the Corporate Trustee their bills in the amount of Ten thousand Dollars (\$10,000), and Six thousand Dollars (\$6,000) together with disbursements of Twenty-four and 28/100 Dollars (\$24.28), to which bills are attached affidavits on behalf of such counsel explaining in reasonable detail the services rendered, copies of which bills with their accompanying affidavits are annexed hereto as Schedules A and B, respectively, and by this reference made a part hereof.

27. That, based upon its experience of many years, the Corporate Trustee is of the opinion that the services rendered by said firm of White & Case, as set forth in the aforesaid affidavit attached to their bill, are reasonably worth not less than the sum of Ten thousand Dollars

(\$10,000), and that the services rendered by said firm of Bryan, Williams, Cave & McPheeters, as set forth in the aforesaid affidavit attached to their bill, are reasonably worth not less than the sum of Six thousand Dollars (\$6,000); and that the Corporate Trustee, pursuant to its powers and in accordance with the provisions of Article Twenty-third of the Mortgage, has paid each of said bills, both fees and disbursements, and such payments constitute reasonable expenses of the Corporate Trustee necessarily incurred and actually disbursed under the Mortgage, such payments, however, having been made subject to their being finally determined to be "reasonable expenses [fol. 39] necessarily incurred and actually disbursed" under the Mortgage.

28. The Corporate Trustee has necessarily incurred herein other reasonable expenses, actually disbursed, as set forth in Schedule C hereto annexed and made a part hereof in the total sum of Seven hundred sixty-seven and 88/100 Dollars (\$767.88) (including reimbursement to counsel for additional necessary, actual and reasonable disbursements in the sum of One hundred seventy-nine and 99/100 Dollars (\$179.99)).

29. That, by Order No. 242, dated December 30, 1940, this Court ordered that all petitions for compensation for services or for expenses (including reasonable attorney's fees) incurred otherwise than under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act, as amended, should be filed in triplicate with the Clerk of this Court on or before February 15, 1941 and served on or before said date as in said Order directed, and that each such petition, not under Section 77 (c) (12), should contain, as nearly as may be, the general matter and the detail required by said Order in respect of petitions under Section 77 (c) (12); that this Petition is filed to meet the aforesaid provisions of said Order No. 242 with respect to services and expenses incurred otherwise than under the aforesaid Section 77 (c) (12).

30. That this Petition shall not be deemed to constitute a waiver (a) of the Corporate Trustee's claim, as set forth in paragraph 17 hereof, that said Section 77 (c) (12) of

the Bankruptcy Act is not applicable to it or (b) of the Corporate Trustee's claim, as set forth in paragraph 19 hereof, that it is entitled to have the extent, validity and priority of its lien or charge for compensation and expenses determined by this Court.

31. That no agreement or understanding exists between the Corporate Trustee and any other person for a [fol. 40] division of compensation; that it has not entered into any agreement, written or oral, express or implied, with any other party in interest or any attorney for any other party in interest for the purpose of fixing the amount of the fees or other compensation to be paid in these proceedings.

32. That the Corporate Trustee reserves its right hereafter to apply for compensation for services rendered and reasonable expenses necessarily incurred and actually disbursed by it after January 31, 1941.

Wherefore, the Corporate Trustee prays that this Court:

1. Adjudicate and decree that said paragraph (c) (12) of Section 77 is not applicable to the Corporate Trustee, or if applicable to the Corporate Trustee that said paragraph is unconstitutional and void;

2. Adjudicate that there is due to the Corporate Trustee the sums set forth in paragraphs 25, 26 and 28 hereof as its compensation and expenses (including the compensation and expenses paid by it to its counsel as aforesaid) and liquidate its claim in the aggregate amount of Twenty-six thousand seven hundred ninety-two and 16/100 Dollars (\$26,792.16);

3. Decree that the Corporate Trustee has a lien and charge in the aggregate amount of Twenty-six thousand seven hundred ninety-two and 16/100 Dollars (\$26,792.16); upon the property covered by the lien of the Mortgage, including the deposited cash, prior and senior to any other lien or charge thereon except operating expenses and Court costs, and decree the payment to the Corporate Trustee of the aforesaid aggregate amount, to the extent not satisfied

from any other source, out of any property and funds available therefor which are covered by the lien of [fol. 41] the Mortgage, or in the alternative permit the Corporate Trustee to foreclose its lien securing its said claim or otherwise to enforce its lien and priority; and

grant to the Corporate Trustee such other and further relief, which it may hereafter apply for, as may be just and proper.

Dated, February 11, 1941.

BANKERS TRUST COMPANY,

By **E. E. BEACH,**
Vice President.

WHITE & CASE,
BRYAN; WILLIAMS, CAVE & McPHEETERS,
Counsel for Bankers Trust Company, as
Corporate Trustee under the Refunding
Mortgage.

[fol. 42] United States of America,
Southern District of New York, } ss.:
County of New York,

E. E. Beach, being duly sworn, deposes and says: that he resides at Summit, New Jersey; that he is a Vice President of Bankers Trust Company; that he has read the foregoing Petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated to be alleged upon information and belief, and that as to those matters and things he believes it to be true.

That the reason why this verification is made by deponent and not by Bankers Trust Company is that Bankers Trust Company is a corporation and deponent is an officer thereof, to-wit, a Vice President.

That the sources of deponent's knowledge and the grounds for his belief as to the matters stated in said

Petition to be alleged upon information and belief are the records of Bankers Trust Company and advices received from its counsel.

E. E. BEACH.

Sworn to before me this 11th day of February, 1941.

C. WALTER BRYDON,

Notary Public, Kings County, N. Y.

Kings Co. No. 940, Register's No. 1534

New York Co. No. 1455, Register's No. 1-B-867

My Commission Expires March 30, 1941

(Notarial Seal)

[fol. 44]

Schedule A.

New York, February 7, 1941.

Bankers Trust Company, Trustee,

Refunding Mortgage dated August 23, 1901,

The Kansas City, Fort Scott & Memphis

Railway Company, St. Louis-San Francisco

Railway Company,

16 Wall Street,

New York, N. Y.

To White & Case, Dr.

14 Wall Street

To Professional Services rendered Bankers Trust Company as Corporate Trustee under the Refunding Mortgage dated August 23, 1901 of The Kansas City, Fort Scott & Memphis Railway Company, from November 10, 1932 to and including January 31, 1941, the details of which services are set forth in the affidavit of Fitzhugh McGrew, verified February 11, 1941, attached hereto and made a part hereof:.... / \$10,000.00

[fol. 46] Affidavit of Fitzhugh McGrew.

In the
District Court of the United States
For the Eastern District of Missouri,
Eastern Division

In the Matter of St. Louis-San Francisco Railway Company, a Missouri corporation, Debtor.	}	In Proceedings for the Reorganization of a Railroad. No. 7004.
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United States of America Southern District of New York State, County and City of New York	}	ss.:
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FITZHUGH MCGREW, being duly sworn, deposes and says:

I am a member of the firm of White & Case, which has acted as counsel for Bankers Trust Company as the Corporate Trustee under the Refunding Mortgage dated August 23, 1901 of The Kansas City, Fort Scott and Memphis Railway Company (hereinafter sometimes called the "Mortgage"), and I make this affidavit in support of the bill of White & Case dated February 7, 1941, rendered to Bankers Trust Company in the amount of \$10,000 covering the services of White & Case as such counsel.

White & Case maintains an office record in which the members and associates of said firm make contemporaneous [fol. 47] daily entries showing in detail the nature of the services rendered by them on the various matters on which they are engaged, and the time devoted thereto. The following is a detailed and specific account prepared from such records of the services rendered by various members and associates of White & Case by months from November 10, 1932 to and including January 31, 1941.

. 1932—November

Consideration of Plan of Readjustment as modified August 29, 1932 and whether any action on the part of the Corporate Trustee is necessary in view of the recent receivership of St. Louis-San Francisco Railway Com-

pany. Consideration and office conference in regard to whether shares of Kansas City, Clinton and Springfield Railway Co. pledged under the Mortgage should be transferred to the name of the Corporate Trustee. Examination of documents in the receivership proceedings.

December (1932)

Retention of Messrs. Bryan, Williams, Cave & McPheeters as local counsel in St. Louis (hereinafter referred to as "local counsel"). Further consideration as to whether the stock pledged under the Mortgage should be transferred to the name of the Corporate Trustee. Consideration of the application of the Receivers of the St. Louis-San Francisco Railway to the R.F.C. for a loan of \$3,000,000 with which to pay taxes and equipment trust maturity and consideration of the application to the Court for authority to issue prior lien Receivers' Certificates. Conference with Mr. Adkins and Mr. Rodgers of Crayath, deGersdorff, Swaine & Wood (counsel for the Reorganization Managers) and Mr. Banks (representing Central Hanover Bank, Prior Lien Mortgage Trustee) in regard to those applications. Examination and consideration of draft of proposed orders in regard to the foregoing, for primary and for ancillary jurisdictions and examination of other documents. Consideration of proposed special appearance of the Corporate Trustee; examination of draft petition for leave to appear specially and of draft order granting that leave, and communications with local counsel in regard to the same. Consideration of the desirability of seeking subrogation to the lien of taxes and equipment trust obligations to be paid with the proceeds of the R.F.C. loan, based on pledge of the Receivers' Certificates and telephone conference and correspondence with local counsel discussing the same. Advising the Corporate Trustee of all of the foregoing.

January (1933)

Telephone conferences with Mr. Rodgers in regard to petition of Receivers for authority to make expenditures for additions and betterments during first six months of 1933 on the property of the St. Louis-San Francisco.

Railway Company etc. and examining notice of filing and of hearing petition in regard to the same. Advising the Corporate Trustee and letter to local counsel in regard to the same. Considering whether it is necessary to advise bondholders to file proof of claim, examining printed receivership record, advising Corporate Trustee that order appointing Receivers exempts the bondholders from filing such proof of claim and telephoning Mr. Rodgers to that effect. Correspondence with local counsel regarding probable amount of refund claims, funds available for payment, taxes, equipment trust payments and other matters constituting diversions.

[fol. 49] February (1933)

Consideration of memorandum of Corporate Trustee and of portion of printed receivership record upon which our advice is solicited by the Corporate Trustee. Advising the Corporate Trustee. Consideration of letter from local counsel in regard to amount of preferred claims reported by the Receivers to be outstanding. Consideration of formal demand by the Receivers upon the Corporate Trustee for cancellation of March 1, 1933 coupons on pledged bonds of Kansas City, Memphis & Birmingham Railroad Co. (hereinafter called "Birmingham Bonds"). Letter to Corporate Trustee advising it as to that demand. Consideration of printed receivership record.

March (1933)

Consideration of whether the Corporate Trustee should present for payment and attempt to collect coupons appurtenant to the Assented Income 5% Bonds of Kansas City, Memphis & Birmingham Railroad; examination of Mortgage in connection with question and advising the Corporate Trustee as to the same. Consideration of printed receivership record including portion authorizing payment of interest on the Birmingham Bonds and portion covering foreclosure suit by Central Hanover Bank and Trust Co. Considering and preparing reply to inquiry of Irving Trust Co. regarding whether the Corporate Trustee would file proof of claim.

April (1933)

Telephone conference with the Corporate Trustee regarding whether pledged stock of Kansas City, Clinton and Springfield Railway Co. should be transferred into name of Corporate Trustee. Consideration of draft form of proposed certificate for execution by officer of St. Louis-[fol. 50] San Francisco Railway Company regarding that transfer. Letter to the Corporate Trustee advising it in the premises. Consideration of memorandum from Corporate Trustee and portion of printed receivership record relating to suit of Central Hanover Bank & Trust Company (Prior Lien Mortgage Trustee) to foreclose its prior lien mortgage. Opinion to Corporate Trustee. Consideration of receivership record.

May (1933)

Examination and consideration of petition in bankruptcy of St. Louis-San Francisco Railway Company (hereinafter referred to as the "Debtor") and order thereon. Letter of advice to the Corporate Trustee.

June (1933)

Consideration of printed record in the bankruptcy proceedings (hereinafter referred to as the "printed record"). Letters of advice to the Corporate Trustee regarding the same. Consideration of Order No. 4 in the bankruptcy proceedings directing filing of Statement of Claim. Working on preparation of Statement of Claim. Telephone conferences with the Corporate Trustee regarding the same.

July (1933)

Telephone conferences with the Corporate Trustee in regard to the recordation of the Mortgage in various states and counties; numerous office conferences respecting same; studying documents in connection therewith; advice to Corporate Trustee thereon. Consideration of whether Corporate Trustee or bondholders should file Statement of Claim. Drafting Statement of Claim for Corporate Trustee. Consideration of whether Corporate [fol. 51] Trustee should intervene. Telephone conferences

with Corporate Trustee in regard to its disposition of interest paid on pledged collateral and related questions. Conference with Corporate Trustee in regard to status of all collateral held under the Mortgage and advice thereon. Consideration of further portion of printed receivership record and advice to Corporate Trustee that it required no action. Telephone conference with Corporate Trustee re personnel of reorganization committee and amount of bonds on deposit.

August (1933)

Legal research in regard to whether filing of Statement of Claim in bankruptcy proceeding makes the creditor a party and if so, to what extent and in regard to whether intervention is necessary for that purpose. Consideration of whether the Corporate Trustee should seek to intervene. Considering order of Interstate Commerce Commission granting leave to intervene to Northwestern Mutual Life Insurance Company and correspondence with Corporate Trustee re the same. Preparing Statement of Claim by the Corporate Trustee; conference with the latter in regard to the same, and arranging for execution of said Claim by the latter and for transmitting it to the Court. Consideration of the printed record. Examination of provisions of the Mortgage in connection with the necessity of recording; examining correspondence with the Receivers of the St. Louis-San Francisco Railway under the previously existing receivership and writing opinion letter to Corporate Trustee in regard to that matter.

September (1933)

Office conferences regarding the pending situation. Telephone conference with Mr. Swaine of Crutath, de [fol. 52] Gersdorff, Swaine & Wood, in regard to the status of the pending plan of reorganization, the appointment of Trustees in bankruptcy; a conference to work out a new plan and other related matters. Telephone conferences with Mr. Rodgers of that firm and with the Corporate Trustee. Preparing form of reply to inquiring bondholders as to what the Corporate Trustee proposes to do to protect the bondholders.

October (1933)

Preparation of reply by Corporate Trustee to bondholder with respect to default in interest. Consideration of the printed record. Correspondence with local counsel and with Corporate Trustee. Correspondence with local counsel in regard to receiving applications in advance of hearings. Consideration of petition of Trustees of the Debtor in regard to conversion of old dining cars and the equipment of freight cars. Further examination of printed record and letter to Corporate Trustee that no action on its part as Trustee was necessary in regard to those portions of the record. Obtaining documents and data from the Corporate Trustee necessary for the preparation of petition of the Corporate Trustee for intervention and for the segregation and sequestration of income earned by the Mortgage. Working on the preparation of that petition for intervention and sequestration. Legal research into various questions arising in the preparation of the same; numerous office conferences and correspondence with local counsel in connection therewith.

November (1933)

Examination of petition of Trustees of the Railway for the abandonment of various branch lines including part of the Clinton branch. Telephone conference with [fol. 53] Mr. Sunderland of Davis, Polk, Wardwell, Gardiner & Reed, counsel for the Bondholders Protective Committee (hereinafter called the "Committee") for the bonds secured by the Mortgage (hereinafter called the "Bonds") and with Mr. Gammell of Milbank, Tweed & Hope, counsel for the Chase National Bank, Trustee of the Consolidated Mortgage, in regard to that abandonment. Office conference respecting the same. Legal research in regard to the effect of the after acquired property clause of the Mortgage in connection with the purchase of railroad property. Continuing preparation of petition for intervention and for segregation order; numerous office conferences in regard to the same; further legal research as to questions arising out of the same including the question whether the rules and practice of the Interstate Commerce Commission should be complied with; conference with Mr. Gammell and telephone conferences

with Mr. Sunderland re same. Further conference with Mr. Gammell and conference with Mr. Rodgers and Mr. Groom of Cravath, de Gersdorff, Swaine & Wood. Consideration of additional portions of the printed record.

December (1933)

Consideration of transcript of proceedings at Washington and conference concerning reorganization plans of the Debtor. Extended office conferences and legal research in regard to whether, in proceedings under Section 77, interest on any obligation should be paid in preference to interest on any other obligations and in regard to right of Trustees under Section 77 to pay interest. Office conference respecting whether borrowing is justified to pay fixed charges on obligations secured by prior lien and whether trustees under equipment trusts have any greater rights than trustees under mortgages. Further work on the petition of the Corporate Trustee for inter-[fol. 54] vention; office conferences and conferences with Mr. Gammell and Mr. Gaillard of Milbank, Tweed & Hope and with Mr. Fitzgibbon of Davis, Polk, Wardwell, Gardiner & Reed all in regard to the same. Putting the petition for intervention and order in final form and working on memorandum in support of it. Preparing petition for leave to intervene and order. Conferences with the Corporate Trustee; arranging for execution of the petition by the Corporate Trustee and by Mr. Smith, individual co-trustee of the Mortgage, in St. Louis and correspondence with local counsel covering execution of, and instructions for filing the petition for leave to intervene. Further office conferences in regard to all of the foregoing.

1934—January

Arranging for execution of the petition for intervention by the Corporate Trustee and sending same to local counsel for execution by Mr. Smith, the individual co-trustee, and for filing. Further work on preparation of brief on the petition for intervention. Consideration of the Order of the Court of January 9, 1934 directing segregation of income. Office conference re same. Examination of petition of trustees of the Debtor for leave to issue \$1,442,545.90 of Trustees' certificates for purchase of new

rails; office conferences in regard to same and seeking to obtain the attitude of the Chase National Bank as pledgee of Bonds and of the Committee toward the same. Conferences with Mr. Fitzgibbon and with Mr. Gammell in regard to the position to be taken by the Committee and by the Chase National Bank respectively on the foregoing matter of Trustees' certificates. Conference with the Corporate Trustee in regard to the position to be taken by the Corporate Trustee on the same. Further office conference re same and re telegram to local counsel setting forth position of the Corporate Trustee. Detailed letter [fol. 55] to local counsel outlining the position of the Corporate Trustee in respect to approaching hearing on Trustees' Certificates and our general views on the situation. Further conference with Mr. Fitzgibbon. Further telephone conferences in regard to the same matter. Further correspondence with local counsel as to the hearing on the issuance of Trustees' Certificates. Letter to Mr. Sunderland and conference with Mr. Gaillard who are to communicate with their St. Louis counsel on the matter. Office conferences in regard to the brief in support of the petition for intervention and sending same to local counsel for the hearing thereon. Telephone conference with Corporate Trustee as to the results of the hearing on the issuance of the Trustees' Certificates. Office conference re same. Office conference in regard to the proposed action by the Trustees of the Debtor to buy and hold matured Equipment Trust Certificates.

February (1934)

Correspondence in regard to hearing on petition for intervention. Consideration of printed record. Office conference in regard to proposed application for loan of \$5,000,000 from R.F.C. to pay off underlying bonds of Kansas City, Memphis and Birmingham Railroad. Conference with Mr. Lane of Milbank, Tweed & Hope, in regard to the same and in regard to petition of Central Hanover Bank & Trust Company for segregation of earnings on oil leases, etc. Correspondence with local counsel on both of those matters and on petition for intervention. Telegram to local counsel re hearing on segregation of revenues from oil leases, etc. Examination of documents

and rendering legal opinion with respect to lost coupons and issuance of duplicate bonds and coupons therefor. Correspondence re additional petitions and orders.

[fol. 56] March (1934)

Conference with Mr. Fitzgibbon as to status of Corporate Trustee's petition for intervention. Correspondence with and instructions to local counsel in regard to hearing for segregation of revenues from oil leases. Office conferences in regard to status of Corporate Trustee's petition for intervention. Correspondence with local counsel and conference with Mr. Fitzgibbon in regard to same. Consideration of and office conferences respecting the form of order to be entered on petition for intervention. Letter to local counsel on form of order to be entered allowing special intervention. Conference regarding order relating to sequestration of earnings.

April (1934)

Further correspondence with local counsel as to form of order on intervention and as to sequestration order. Conference with Corporate Trustee concerning allowance of special intervention. Conference with Mr. Lane and Mr. Lewis as to brief on segregation of income from oil properties. Letter to local counsel in regard to such segregation from oil leases. Office conference in regard to status of petition for intervention of the Corporate Trustee and in regard to the effect of the segregation order of January 6, 1934 on the earnings and expenses of the property covered by the Mortgage. Examination of answers filed by Debtor's Trustees and by Central Hanover Bank and Trust Company, as Prior Lien Mortgage Trustee, to our petition. Examination of proposed petition for payment of interest on the Birmingham Bonds and office conference in regard to that matter. Conference with Mr. Lane in regard to the same. Correspondence with local counsel as to oil leases and earnings thereon and conference with Mr. Lane as to same. Examination of files and records to date. Correspondence with local counsel regarding pending motions.

[fol. 57] May (1934)

Correspondence in regard to order granting special intervention to the Corporate Trustee and office conference on same. Office conference as to form of order on prayer for segregation of earnings. Further office conference as to segregation. Consideration of Mr. Sunderland's memorandum regarding payment of interest on underlying mortgages. Office conference on letter to Mr. Sunderland in regard to same. Correspondence with local counsel respecting hearing on same. Conference with Mr. Fitzgibbon as to Corporate Trustee's petition for intervention. Correspondence with local counsel as to contents of the printed record.

June (1934)

Correspondence in regard to the contents of the printed record and as to obtaining advance notice of pending motions, etc. Examination of additional portions of the printed record. Further correspondence.

July (1934)

Office conference in regard to requirements by Corporate Trustee for release of certain property subject to the Mortgage which had been sold by the Debtor. Correspondence with Corporate Trustee and consideration of order of Interstate Commerce Commission for determination of question whether the Debtor is insolvent.

August (1934)

Examination of file on matter of segregation of earnings and in regard to whether claims were filed by the bondholders.

September (1934)

Correspondence as to printed record. Examination of notice of hearing as to insolvency of the Debtor.

[fol. 58] October (1934)

Correspondence in regard to abandonment of branch of the Debtor. Office conference respecting hearings on

insolvency of the Debtor. Miscellaneous other correspondence.

November (1934)

Consideration of additional portions of the printed record.

1935—January.

Consideration of additional portions of the printed record. Correspondence.

March (1935)

Preparation of answer to inquiring bondholder upon legal aspects of situation. Consideration of petition and order for examination by Debtor's Trustees of former directors and bankers for the Debtor. Correspondence and consideration of the printed record.

April (1935)

Consideration of petition for abandonment of certain trackage at Granby. Consideration of the printed record.

May (1935)

Office conference in regard to proposed suit by Debtor's Trustees against Speyer & Company and Seligman and others. Telephone conference with Mr. Lane in regard to the same. Office conference, and conference with Mr. Fitzgibbon. Examination of additional records in regard to intervention by the Consolidated Mortgage Trustee; consideration of intervention petition and order permitting that Trustee to intervene. Conference with Mr. Fitzgibbon in regard to matter of proof of lien, etc. and advisability of having that issue brought on at once or postponed. Further consideration of proceedings proposed to be instituted by the Debtor's Trustees against Seligman and others.

June (1935)

Conference with Mr. Fitzgibbon and with Mr. Gammell in regard to the petition for intervention of the Consolidated Mortgage Trustee and conference with Mr. Lewis

in regard to answer of Central Hanover Bank, Prior Lien Trustee, to that petition. Preparation of answer of the Corporate Trustee to that petition for intervention and correspondence in regard to the same. Consideration of additional portions of the printed record.

September (1935)

Consideration of report and order of Interstate Commerce Commission relating to the application of the Central Hanover Bank for services in the foreclosure proceedings which preceded the proceedings in Section 77 and letter to the Corporate Trustee thereon. Consideration of additional portion of the printed record.

October (1935)

Examination of proposed petition for payment of baggage claims, etc.

November (1935)

Conferences with Mr. Fitzgibbon respecting proposed interest payments on the Birmingham Bonds. Advice to Corporate Trustee accordingly. Wire to one of Debtor's Trustees and telephone conferences with the Corporate Trustee in regard to the same. Examination of papers [fol. 60] on motion for betterments and improvements; conference with Mr. Fitzgibbon in regard to the position to be taken by the Committee and the Corporate Trustee. Miscellaneous correspondence. Consideration of the printed record.

December (1935)

Correspondence in regard to judgment lien asserted to be prior to lien of the Mortgage. Examination of records and preparation of memorandum in regard to segregation of earnings. Conferences with Mr. Fitzgibbon in regard to petition and order for hearings with respect to accrued interest on the Birmingham Bonds and with respect to the matter of segregation of earnings and the formula therefor in connection with the Fort Scott line. Conference with Mr. Stiefel of Milbank, Tweed & Hope. Correspondence in regard to hearings on proposed

payment of interest on the Birmingham Bonds. Consideration of additional portions of the printed record.

1936—January

Correspondence in regard to the proposed pledging of the Gulf Railway stock under the Prior Lien Mortgage; examination of provisions of the Mortgage and conference with the Corporate Trustee. Correspondence in regard to interest payments on the Birmingham Bonds.

February (1936)

Conference with Mr. Fitzgibbon and letter to local counsel in regard to proposed payment of accrued interest on the Birmingham Bonds. Examination of petition thereon. Conference with the Corporate Trustee as to those Bonds pledged under the Mortgage. Consideration of additional portions of the printed record.

[fol. 61] March (1936)

Examination of the Mortgage. Conference with the Corporate Trustee in regard to the status of cancelled Birmingham Bonds held by the Corporate Trustee. Miscellaneous correspondence. Consideration of the printed record of recent proceedings. Further conference with the Corporate Trustee, examination of the Mortgage and consideration of facts on the same. Opinion letter to the Corporate Trustee in regard to proposed surrender of coupons on these cancelled Bonds. Examination of petitions for abandonments. Correspondence.

April (1936)

Correspondence with local counsel and with the Committee in regard to proposed abandonment of the Bessie Branch of the railroad. Examination of the Mortgage. Consideration of additional portion of the printed record.

May (1936)

Consideration of printed record in regard to payment of interest on the Birmingham bonds and letter to the Corporate Trustee thereon. Correspondence in regard to the petition on those bonds. Drafting reply to bond-

holders' inquiry as to proof of claim. Further correspondence.

June (1936)

Consideration of additional printed record including the order for payment of interest on the Birmingham Bonds pledged under the Mortgage. Correspondence in regard to extension of time to file Plan of Reorganization. Office conference. Conference with Mr. Fitzgibbon in regard to earnings and non-payment of interest and the proposed acquisition of additional equipment and funds therefor.

[fol. 62] July (1936)

Telephone conference with Mr. Fitzgibbon in regard to recent communications between the Committee and their St. Louis counsel on the proposed payment of equipment trust maturities out of earnings and computation of earnings available as distinguished from earnings accruing on the properties subject to the Mortgage. Correspondence and conference with Mr. Fooshee of Davis, Polk, Wardwell, Gardiner & Reed in regard to further hearings on plan of readjustment of 1932.

October (1936)

Correspondence in regard to petition to pay interest on the Birmingham Bonds including those pledged with the Corporate Trustee. Office conference. Examination of correspondence thereon. Letter to Mr. Fitzgibbon. Consideration of additional printed record. Correspondence in regard to petition to lease locomotives.

November (1936)

Preparation of form of Petition for Intervention by the Corporate Trustee at the hearings before the Interstate Commerce Commission on the Plan of Reorganization. Letter to Davis, Polk, Wardwell, Gardiner & Reed. Office conference and conference with Mr. Stiefel. Further office conference on the hearing on December 1, on that Petition and on the plan of reorganization expected to be submitted. Conference with Mr. Groom. Further office conferences on the intervention petition and conference with

the Corporate Trustee. Office conference and correspondence in regard to that petition. Letters to Corporate Trustee and to Mr. Sanderland regarding petition for additions and betterments in 1937.

[fol. 63] December (1936)

Opinion letter to the Corporate Trustee approving papers for payment of missing coupon. Attending hearing before the Interstate Commerce Commission on the plan of reorganization. Office conference and conference with Mr. Gammell in regard to petition for additions and betterments. Examination of petition of Committee in regard to payment of interest on the bonds secured by the Mortgage; office conference; conference with Mr. Fitzgibbon and conference and correspondence with the Corporate Trustee respecting same. Further correspondence re same. Telephone conferences with Mr. Swaine and conference with Mr. Fitzgibbon as to motion before Interstate Commerce Commission. Conferences with Mr. Fitzgibbon and with the Corporate Trustee and office conference in regard to petition for payment of interest on the Bonds and regarding the proposal dismantlement of equipment by the Debtor's Trustee and the status of the Mortgage as to the same.

1937—January

Correspondence, examination of the Mortgage and of the reorganization proceedings and conference with the Corporate Trustee in connection with an inquiry of bondholder as to the status of cancelled and uncanceled Birmingham Bonds held under the Mortgage. Conference with Mr. Fitzgibbon and with the Corporate Trustee as to the same; drafted reply to inquiring bondholder and further correspondence as to same. Correspondence and conference with Mr. Fitzgibbon in regard to salvage in the disposition of obsolete equipment. Conference with Mr. Stiefel and conference with Mr. Fitzgibbon respecting proposed extension of spur track. Conferences with the Corporate Trustee and with Mr. Fitzgibbon respecting question of insolvency of the Railway pending before Interstate Commerce Commission. Correspondence respect-
[fol. 64] ing hearing on Committee's petition for payment

of interest on the Bonds and in regard to the share of salvage of obsolete equipment, belonging to the holders of the Bonds. Telephone conferences with the Corporate Trustee and with Mr. Fitzgibbon.

February (1937)

Correspondence re hearing on interest payment on the Bonds. Telephone conference with Mr. Stiefel re Master's report on petition for intervention by Committee for Birmingham Bonds.

March (1937)

Approving reply to inquiring bondholder. Correspondence regarding equipment under the Mortgage. Conference with Mr. Fitzgibbon in regard to Committee's application for interest. Examination of papers re Interstate Commerce Commission order on original plan of reorganization of the Debtor. Correspondence in regard to equipment constituting part of security under the Mortgage.

April (1937)

Examined printed record. Considering papers re issuance of duplicate bonds. Examination of the Mortgage in connection with sale of locomotive subject to the Mortgage. Correspondence in connection with proper release of same and securing the proceeds for the benefit of the Mortgage. Correspondence regarding extension of time for Debtor to file a plan of reorganization.

June (1937)

Further correspondence in regard to sale of locomotive and release thereof from the Mortgage. Telephone conference with Mr. Fitzgibbon and with the Corporate [fol. 65] Trustee in regard to payment of interest on the Bonds. Correspondence re inquiry of a holder of the Bonds. Considered plan of reorganization proposed by Mr. Stratton. Telephone conference with Mr. Fitzgibbon in regard to situation. Correspondence.

July (1937)

Telephone conference with the Corporate Trustee re present status. Consideration of additional portions of printed record. Telephone conference with the Corporate Trustee re court orders for segregation purposes. Conference with Mr. Fitzgibbon in regard to opposition to petition of Debtor's Trustees to use cash on hand to purchase equipment obligations.

August (1937)

Telephone conference with the Corporate Trustee and advice to local counsel of position of the Corporate Trustee as to the use of cash to purchase equipment obligations. Telephone conference with Mr. Fitzgibbon re same.

September (1937)

Consideration of the printed record. Conference with the Corporate Trustee and correspondence regarding destruction of certain obsolete locomotives.

October (1937)

Continuing consideration of printed record. Conference with Mr. Stiefel with respect to pending motion for the purchase of steel cars.

November (1937)

Correspondence in regard to proposed petition for sale of land under the Mortgage; conferences with Mr. Stiefel; [fol. 66] letter to and conferences with the Corporate Trustee re same. Correspondence and consideration of pending motions and hearings. Examined proposed Plan of Reorganization for the Debtor. Conferences with the Corporate Trustee in reference to proposed expenditures of the Debtor for 1938 and certain points in the Plan of Reorganization.

December (1937)

Correspondence. Further conferences with the Corporate Trustee and with Mr. Fitzgibbon in connection with proposed expenditures of the Debtor for betterments for

1938. Examining memorandum prepared by Committee on question of payment of interest on the Bonds. Conferences with the Corporate Trustee and with Mr. Fitzgibbon in regard to that brief and concurring memorandum to be filed by the Corporate Trustee; further conference with Mr. Fitzgibbon and conference with Mr. Stiefel regarding same; office conference and consideration of the brief of the Committee, and preparation of memorandum on same on behalf of the Corporate Trustee. Office conferences and conferences with the Corporate Trustee on the same matter. Correspondence re same. Further conference with the Corporate Trustee. Conference with the Corporate Trustee and with Mr. Fitzgibbon regarding figures and data as to earnings of the Debtor. Correspondence and office conference on the foregoing memorandum re payment of interest. Further conference with Mr. Fitzgibbon.

1938—January

Conference with the Corporate Trustee and office conference as to formula on earnings and approaching hearings before the Interstate Commerce Commission.

[fol. 67] February (1938)

Conferences with Mr. Maston of Davis, Polk, Wardwell, Gardiner & Reed and with the Corporate Trustee and office conference with respect to the approaching I.C.C. hearings. Examination of circular letter of Committee. Attendance of hearing on Debtor's Plan of Reorganization before the Interstate Commerce Commission in Washington with representatives of the Corporate Trustee and conferred with counsel for Committees. Office conference re same.

March (1938)

Conference with the Corporate Trustee on letter to the holders of the Bonds. Examination of papers on motion to adjourn I.C.C. hearings and office conference re same.

April (1938)

Conferences with Mr. Fitzgibbon, Mr. Heiss of Larkin, Rathbone & Perry and with the Corporate Trustee and

office conference in regard to pending petition of Central Hanover Bank as Prior Lien Trustee for collateral and dividends thereon under after-acquired property clause. Correspondence. Further conferences with Mr. Fitzgibbon and with the Corporate Trustee and further office conference re same. Letter to counsel for Committee. Conferences with Mr. Wickersham and with Mr. Fitzgibbon and examination of record of reorganization proceedings of the Debtor in 1917, in connection with the foregoing petition of the Central Hanover Bank. Further conference with Mr. Wickersham; conference with Mr. Adkins, and correspondence in regard to the same. Office conference in regard to whether after-acquired property clause in a pledge of stock was effective after institution [fol. 68] of proceedings under Sec. 77. Further conference with Mr. Wickersham and office conference re same. Legal research as to whether lien of after-acquired property clause attaches to securities acquired by the mortgagor but not pledged prior to institution of Sec. 77 proceedings. Numerous office conferences as to the law and procedure to be adopted. Further extended legal research as to whether after-acquired property clause will be enforced against a trustee in bankruptcy when possession of the property has never been taken. Examination of the Mortgage and of the 1916 Plan of Reorganization in that connection. Telephone conference with local counsel.

May (1938)

Conference with the Corporate Trustee in regard to the petition of Central Hanover Bank for the after-acquired collateral. Correspondence.

June (1938)

Correspondence in regard to suits in Crawford County, Kansas, to quiet title. Conference with the Corporate Trustee, examination of its files and drafting letters to officers of the Debtor respecting the accounting for proceeds of released and salvaged and abandoned properties.

July (1938)

Conferences with the Corporate Trustee and correspondence with respect to motion for construction of a round house and demolition and salvage of old house.

August (1938)

Further correspondence re salvage of round house. Correspondence and consideration of motion and order to file claim in connection with Birmingham Bonds. Con-[fol. 69] sideration of order prescribing last day to file proof of claim by Old Colony Trust Co. as Trustee under General Mortgage of Kansas City, Memphis & Birmingham R.R. Letter to the Corporate Trustee embodying recommended form of letter to Old Colony Trust Company. Consideration of additional portions of the printed record.

September (1938)

Consideration of additional printed record and additional pleadings. Conference with the Corporate Trustee and correspondence with respect to the proposed sale of or destruction of obsolete equipment.

October (1938)

Further conferences with the Corporate Trustee and correspondence in connection with question of accounting for salvage and consideration of proposed letter by the Corporate Trustee to the Debtor in connection therewith. Further conference and suggesting revisions in that letter. Conferences with the Corporate Trustee in regard to the proposed Plan of the three Committees and the question of lien on equipment. Examined Plan of Reorganization proposed by the three Bondholders Committee. Conference with the Corporate Trustee considering that Plan. Further study of that Plan. Office conference and conference with the Corporate Trustee re approaching I.C.C. hearing. Consideration of additional printed record.

November (1938)

Attendance at hearing at Washington on Plans of Reorganization proposed by the Debtor and by the Committees and conferred with Mr. Fitzgibbon and others at the hearing. Conference with the Corporate Trustee respecting authorized payment of installment of interest. Office conference in regard to petition of Central Hanover Bank for assignment of after-acquired property as col-[fol. 70] lateral. Telephone conference with Mr. Fitzgib-

bon. Conference with Mr. Stiefel respecting proposed sale and release of certain properties under the Mortgage and deposit of proceeds with the Corporate Trustee. Consideration of petition for sale; conference with the Corporate Trustee and with Mr. Stiefel.

December (1928)

Consideration of correspondence between the Debtor and the Corporate Trustee and opinion letter respecting application of salvage proceeds. Consideration of proposed budget for 1939 and conference with the Corporate Trustee. Correspondence regarding sale of certain of the mortgaged property. Correspondence re appropriations for additions and betterments and conference with the Corporate Trustee.

1939—January

Correspondence respecting petition for interest on Birmingham Bonds. Consideration of additional printed record. Examination of brief of the Committees in support of the Plan. Examination of briefs of numerous parties.

February (1939)

Reply to letter to the Corporate Trustee in regard to proceedings to remove cloud on land in Kansas; preparing letter to Debtor's Trustee, and conference with the Corporate Trustee. Conference with the Corporate Trustee respecting the question of application of salvage from the abandonment of the Springfield Branch.

March (1939)

Correspondence in regard to suit to remove cloud on title to Kansas land and conference with the Corporate [fol. 71] Trustee. Consideration of printed record of recent proceedings. Conference with the Corporate Trustee as to released properties and correspondence.

May (1939).

Considering question of releasing from the Mortgage properties which have been heretofore sold; examination of provisions of the Mortgage; letter to the Corporate

Trustee, and office conference. Further correspondence and conference with the Corporate Trustee re same. Conference with the Corporate Trustee and correspondence regarding salvage and sale of obsolete equipment. Office conference in regard to the status under the proposed Plan of Reorganization of funds set aside for payment of matured coupons prior to receivership. Correspondence re matured collateral.

June (1939)

Correspondence with respect to the proposed payment of interest on the pledged Birmingham Bonds. Conference with the Corporate Trustee and office conference in regard to statute of limitations on the matured Birmingham Bonds pledged under the Mortgage and correspondence on same. Consideration of additional printed record.

July (1939)

Correspondence respecting proposed guaranty of new Terminal Railroad Refunding Bonds to retire outstanding First Mortgage Bonds; examination of papers and telegram to Debtor's Trustee re same. Examination of papers with respect to pledged Birmingham Bonds and with respect to execution of releases covering property sold prior to 1914. Conference with Mr. Fitzgibbon in regard to said proposed release of property sold prior to [fol. 72] 1914 and approval of documents for execution of said releases. Correspondence in regard to those releases. Correspondence in regard to proposed sale of portion of Gulf, Texas & Western Ry which is not under the Mortgage and conference with the Corporate Trustee as to same. Consideration of additional printed record. Correspondence re proceeds of sale and salvage of obsolete equipment.

August (1939)

Consideration of miscellaneous motions and reports of the I.C.C. on pending Plan of Reorganization. Correspondence re payment of interest.

September (1939)

Further consideration of motions, I.C.C. reports as to Plan of Reorganization and status of pending land suit. Conference with Mr. Fitzgibbon as to his motion in connection with payment of October 1, 1933 interest; conference with the Corporate Trustee; and correspondence as to same and order covering the same.

October (1939)

Consideration of additional printed record and circular letter of the Committee with respect to payment of October 1, 1933 interest. Correspondence and telegram with respect to postponement of hearings on proposed report of Examiner on Plan of Reorganization and conference with the Corporate Trustee as to that report. Examination of various exceptions and briefs to the Examiner's proposed report.

November (1939)

Further examination of briefs and exceptions to the Examiner's proposed report on Plan of Reorganization.

[fol. 73] December (1939)

Consideration of additional printed record.

1940—January

Consideration of petition for 1940 expenditures for betterments and conference with the Corporate Trustee thereon. Correspondence as to proceeds of salvaged equipment. Consideration of additional printed record.

February (1940)

Consideration of additional printed record. Correspondence in regard to proposed petition and order on classification of creditors and conference with the Corporate Trustee. Office conference in respect to the pleadings and orders on the claim of the U. S. Fidelity & Guaranty Co. as surety for preferential personal injury claims.

March (1940)

Consideration of additional printed record and motions.

May (1940)

Consideration of additional printed record and motions.

June (1940)

Consideration of motions with respect to proposed payment of current interest on the Birmingham Bonds; correspondence and telephone conference with the Corporate Trustee re same. Further correspondence respecting same.

July (1940)

Consideration of additional printed record. Examination of report on proposed Plan of Reorganization by the [fol. 74] I.C.C. Office conference and correspondence respecting same.

August (1940)

Examination of the report of the I.C.C. on the Plan of Reorganization, the Commission's order and the Committee's circular letter. Telephone conference with Mr. Fitzgibbon and with the Corporate Trustee in regard to whether to file objections to the treatment of the holders of the Bonds, under the Plan. Consideration of additional printed record.

September (1940)

Consideration of motions with respect to the pending Plan of Reorganization. Examining briefs on the Plan.

October (1940)

Correspondence and examined briefs in connection with the proposed modification as to the constitution of the Reorganization Committee. Conference with and advice to the Corporate Trustee as to whether the court order protecting the rights of undeposited bonds of foreclosed issues will survive reorganization. Telephone conference with the Corporate Trustee as to the petition of the three Committees for payment of interest on the Bonds and as to the proposed circular letter of the Committee. Correspondence in connection with that petition.

November (1940)

Examination of Plan of Reorganization as reported by I. C. C.

December (1940)

Consideration of motions in regard to sale of obsolete locomotive and other motions.

[fol. 75] 1941—January

Examination of order in connection with petitions for licenses. Consideration of additional pages of the printed record.

The records of White & Case show that a total of 421 hours was devoted to this matter from November 10, 1932 to January 31, 1941 by various partners and associates of that firm. Approximately two-thirds of such services were rendered by deponent and by Sherwood Hall, Esquire.

Deponent has been a member of the Bar of the State of New York since June, 1902 and a member of the firm of White & Case since January, 1927. Deponent has had long experience in representation of trustees of railroad mortgages and in the conduct of railroad equity receiverships and proceedings under Section 77 of the Bankruptcy Act. Mr. Hall has been a member of the Bar of the State of New York since November, 1913 and has also had many years of experience in the representation of trustees of railroad mortgages and in the conduct of railroad equity receiverships and proceedings under Section 77.

FITZHUGH MCGREW

Sworn to before me this 11th day of February, 1941.

CHARLES KEATING RICE

Charles Keating Rice

Notary Public, Kings County

Kings Co. Clk's No. 123, Reg. No. 2141

Certificate filed in New York Co., N. Y.

N. Y. Co. Clk's No. 884, Reg's No. 2R556

Commission expires March 30, 1942

(Notarial Seal)

[fol. 76]

Schedule B

Bankers Trust Company, Trustee under
 Refunding Mortgage, dated August 23, 1901,
 of The Kansas City, Fort Scott & Memphis
 Railway Company, and St. Louis-San Fran-
 cisco Railway Company,
 16 Wall Street,
 New York City, New York

To Bryan, Williams, Cave & McPheeters
 1630 Boatmen's Bank Bldg.—Saint Louis

January 31, 1941

To professional services rendered to Bankers
 Trust Company, as corporate trustee under the
 Refunding Mortgage dated August 23, 1901 of
 The Kansas City, Fort Scott & Memphis Rail-
 way Company, from December 24, 1932 to and
 including January 31, 1941, the details of which
 services are set forth in the affidavit of Rhodes
 E. Cave, attached hereto and made a part hereof \$6,000.—
 Disbursements 24.28

[fol. 77]

Affidavit of Rhodes E. Cave.

In the
 District Court of the United States
 Within and for the Eastern Division of the Eastern
 Judicial District of Missouri.

In the Matter of

St. Louis-San Francisco Railway
 Company, a corporation,
 Debtor.

In Proceedings
 for the
 Reorganization
 of a Railroad.
 No. 7004.

United States of America
 Eastern District of Missouri
 City of St. Louis
 State of Missouri } ss. :

RHODES E. CAVE, being duly sworn, deposes and says:

I am a member of the firm of Bryan, Williams, Cave &
 McPheeters, 1630 Boatmen's Bank Building, St. Louis, Mis-
 souri, which has acted as local counsel for Bankers Trust

Company, as the corporate trustee under the Refunding Mortgage, dated August 23, 1901, of The Kansas City, Fort Scott & Memphis Railway Company, and I make this affidavit in support of the bill of Bryan, Williams, Cave & McPheeters, dated January 31, 1941, rendered to Bankers Trust Company, in the amount of \$6,000, covering the services of Bryan, Williams, Cave & McPheeters as such counsel.

[fol. 78] Bryan, Williams, Cave & McPheeters maintains an office record in which the partners and associates make contemporaneous entries showing the nature of the services rendered by them on various matters on which they are engaged, and the time devoted thereto. This record does not purport to cover every activity of the partners and associates. Only matters requiring a substantial amount of time are recorded. The record is kept as a reminder of substantial amounts of time spent on matters which might otherwise escape, rather than as a detailed and accurate account of all time spent by the various partners and associates. The following is a detailed and specific account, prepared from such records, from the correspondence files and from the pleadings and other records in the case:

1932

December Received wire from White & Case, asking whether this firm available to act with them in representing Bankers Trust Company, as trustee under Refunding Mortgage of The Kansas City, Fort Scott & Memphis Railway Company, in St. Louis-San Francisco Railway Company receivership proceedings; (Hereinafter the above mortgage will be referred to as the "Fort Scott Mortgage", the St. Louis-San Francisco Railway Company as the "Debtor", and the Bankers Trust Company as "Mortgage Trustee");

Answer to wire advising this firm available;

1932

Receipt of day letter from White & Case regarding proposed application of receivers to issue \$3,000,000 receivers' certificates, also advising of forwarding petition of Bankers Trust Company for leave to appear specially [fol. 79] cially and form of proposed order; also instructing to execute petition and approve order, subject to our judgment that doing so would not subject the Trustee or the trust res to the jurisdiction of the court, subject also to satisfactory proof that Debtor's equity in the equipment proposed to be bought with the proceeds of receivers' certificates would be equal to face value of receivers' certificates and to our judgment that proposed order made adequate provision for cancellation of equipment trust obligations;

December Long distance telephone conversation with Mr. Wade of White & Case;

Conference with Mr. Miller of the Frisco, counsel for Central Hanover Bank & Trust Company and Chase National Bank in regard to proposed receivers' certificates;

Examination of draft of order proposed to be entered authorizing the issuance of receivers' certificates by primary court and similar orders to be entered in ancillary jurisdictions;

Consideration of incorporation in decree of provision for subroga-

1932

tion to the rights of lien holders whose claims are paid with proceeds of receivers' certificates in the event property subject to Fort Scott Mortgage should be called upon to pay receivers' certificates;

Advice in this regard to White & Case;

Attendance in court at hearing upon issuance of receivers' certificates;

Forwarding copies of various orders as entered to White & Case; [fol. 80] Receipt from White & Case of letter concurring in opinion as to incorporation in decree of provision for subrogation.

Approximate time 20 hours

1933

January

Receipt of letter from White & Case advising of proposed petition of receivers for authority to make additions and betterments and to make loans to subsidiary companies; stating position of White & Case with reference to notices in advance of applications in proceeding, requesting also that this firm give consideration to the question as to when payment of accrued taxes, equipment trust obligations, mortgage interest, etc. would adversely affect the rights of preferred creditors, and requesting that this firm obtain an estimate, if possible, of the amount of six months' pre-receivership claims;

1933

Examination of cases cited in letter;

Legal research and consideration of questions raised;

Letter to Mr. Miller of Debtor requesting advice as to the probable amount of six months' pre-receivership claims;

Letter to White & Case discussing legal questions raised in their letter of January 12th; further letter to Mr. Miller requesting advice as to amount of six months' pre-receivership claims.

Approximate time 7 hours

February Correspondence with Mr. Miller and with White & Case regarding probable amount of six months' claims;

Estimated time 1½ hours

October Correspondence with White & Case and Mr. Miller of Debtor with [fol. 81] respect to service in advance of notices and copies of applications, motions, etc. filed in court;

Correspondence with White & Case, enclosing copies of their correspondence with counsel for other mortgage trustees;

Legal research and consideration of question of the necessity of mortgage trustees' intervening in court and filing petitions in order to have income of mortgaged properties impounded for benefit of bondholders, with special reference to rulings on

1933

above questions in Missouri and adjacent jurisdictions.

Approximate time 10 hours

November

Examination and consideration of proof of proposed petition for intervention; comparison of recording data in petition with records of Debtor; letter of advice with regard thereto;

• Correspondence with White & Case regarding hearings on application for petition for abandonment of portion of line of Kansas City, Clinton & Springfield Railway;

Consideration of petition for leave to intervene upon hearing on application for abandonment; service and filing same;

Conference with counsel for Debtor's Trustee regarding postponement of hearing on petition to abandon;

Conference with District Clerk as to setting of hearing;

Conference with counsel for Debtor's Trustee regarding proof to be adduced upon hearing of petition for abandonment;

Further correspondence and telegrams with White & Case on abandonment proceedings;

[fol. 82] Further conference with counsel for Debtor's Trustee concerning proof to be submitted at hearing; and consideration of proposed order of court;

Attendance in court at hearing upon petition for abandonment;

1933

Further correspondence with White & Case in regard to abandonment proceedings.

Approximate time 18 hours

December

Examination and consideration of petition of Mortgage Trustee for leave to intervene and for impounding of income, and of legal questions discussed in letter transmitting same; procuring signature to petition; correspondence regarding same;

Legal research and correspondence with respect to right of Mortgage Trustee to have income impounded;

Approximate time 12 hours

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January

Preparation and service of notices on all parties of filing petition for leave to file intervening petition;

Attendance in court to obtain setting of hearing on petition;

Correspondence and telegrams with White & Case with regard to nature of order as to hearing on petition for leave to file intervening petition, also as to questions to be considered by the court upon the hearing;

Procuring copy of order entered on January 3rd;

Further conference with court and counsel for Debtor's Trustee, and letters advising that hearing on January 29th would be confined to question of intervention [fol. 83] tion and would not deal

with question of impounding or segregating income;

Correspondence as to brief on petition for intervention and as to position of Mortgage Trustee with respect to issuance of trustee's certificates for improvement of transportation facilities;

Conference with counsel for Debtor's Trustee with regard to setting of application for leave to issue trustee's certificates;

Further telegrams and correspondence with White & Case as to appearance in opposition to application for leave to issue trustee's certificates, and postponement of hearing before Master on issuance of trustee's certificates;

Further correspondence with White & Case regarding objections to issuance of trustee's certificates, and suggested procedure before the Master with respect to opportunity to file objections and briefs;

Legal research and correspondence with White & Case regarding authority to issue trustee's certificates;

Further correspondence with White & Case regarding appearance before Master in opposition to issuance of trustee's certificates;

Consideration of brief upon petition for leave to intervene;

Attendance at hearing before Spe-

1934

cial Master on issuance of trustee's certificates;

Further correspondence with White & Case regarding procedure with respect to issuance of trustee's certificates;

[fol. 84] Attendance in court and presentation of petition for leave to intervene;

Correspondence with White & Case as to same.

Approximate time 25 hours

February

Correspondence with White & Case, requesting information with respect to segregation of proceeds of oil leases, also respecting whether proposed issuance of trustee's certificates to cover maturities of Kansas City, Memphis & Birmingham bonds contemplated cancellation and payment of bonds or purchase of bonds to be pledged with RFC;

Conference with counsel for Debtor's Trustee and procuring above information;

Further correspondence with White & Case regarding same;

Correspondence with White & Case with regard to appearance at hearing on application of Central Hanover Bank for segregation of revenues from oil leases and with regard to securing order for segregation of similar revenues with respect to Kansas City, Fort Scott & Memphis bondholders;

1934

Conference with counsel for Debtor's Trustee with regard to oil properties covered by Fort Scott Mortgage;

Attendance in court at hearing on application of Central Hanover Bank.

Approximate time 8 hours

March

Correspondence with White & Case in regard to court's ruling on petition of Mortgage Trustee for leave to intervene;

Correspondence with White & Case as to setting of hearing on petition of prior lien mortgage trustees for segregation of [fol. 85] oil revenues and as to securing similar order with respect to any oil properties which might be subject to lien of Fort Scott Mortgage;

Further correspondence as to same;

Attendance at hearing before Special Master on petition of prior lien mortgage trustees for segregation of oil revenues;

Correspondence with White & Case as to same;

Correspondence as to action of Judge Faris on application of United States for leave to intervene;

Correspondence with White & Case as to order entered by Judge Faris permitting Mortgage Trustee to intervene specially;

1934

Conference with Judge Faris upon same;

Further correspondence with respect to effects of order permitting special intervention and possibility of obtaining order for leave to intervene generally.

Approximate time 12 hours

April

Further correspondence with White & Case concerning right of Mortgage Trustee to intervene generally;

Correspondence with White & Case and conferences with Debtor's Trustee with regard to service with advance notice of all applications;

Correspondence with White & Case as to setting of hearings upon petition of Mortgage Trustee for segregation of income;

Correspondence with White & Case and counsel for Central Hanover Bank & Trust Company in regard to testimony of Mr. Kurn that certain oil leases had [fol. 86] been executed with respect to lands covered by Fort Scott Mortgage;

Examination of answer of Bankruptcy Trustee to petition of Mortgage Trustee for leave to intervene and for segregation of income;

Analysis of the same and correspondence with White & Case with regard to portions of above petition admitted by answer and portions which would require proof;

1934

Consideration of answer of prior lien mortgage trustees to Mortgage Trustee's petition for segregation and correspondence with White & Case regarding same;

Correspondence with White & Case as to petition of Debtor's Trustee for leave to pay interest on certain bonds;

Correspondence with White & Case as to setting of date for hearing on petition for segregation;

Correspondence with White & Case as to entry in printed record of an order permitting special intervention of Mortgage Trustee;

Approximate time 11 hours

May

Further correspondence with White & Case as to attendance at hearing on application for payment of interest;

Further correspondence as to correction of order allowing special intervention;

Legal research and correspondence with White & Case regarding recent cases on question of segregation of earnings;

Further correspondence as to proper entry of order permitting special intervention;

Conference with counsel for Debtor [fol. 87] or Trustee with regard to correction of order permitting special intervention.

Approximate time 8½ hours

1934

June

Correspondence with counsel for Debtor's Trustee as to incorporation in printed record of order permitting special intervention;

Further correspondence as to same;

Correspondence regarding service of notices of all applications and petitions.

Approximate time 1½ hours

September

Correspondence with White & Case, and counsel for Debtor's Trustee as to service of notices of all applications and petitions.

Approximate time ¾ hour

October

Attendance at hearing before Special Master on proposed investigation as to solvency or insolvency of Debtor;

Report of proceedings to White & Case.

Approximate time 5 hours

1935

June

Attendance in court to obtain additional time for filing answer to petition of Chase National Bank;

Correspondence with White & Case re same;

Attendance at hearing in Federal Court;

Consideration, execution and filing of answer of Mortgage Trustee to petition of Chase National Bank;

Correspondence with White & Case and with counsel for Chase National Bank regarding same;

Approximate time 5 hours

1935

November

Conference with counsel for Debtor's Trustee, examination of papers in court and correspondence with White & Case in regard to report of Special Master [fol. 88] on claim of J. H. McCommon, giving said claim priority over lien of Fort Scott Mortgage.

Approximate time 6 hours

December

Conference and correspondence with White & Case and with counsel for Debtor's Trustee, and examination of records at Clerk's office re failure of Debtor's Trustee to file report as to segregation of earnings of property subject to Fort Scott Mortgage;

Further correspondence with reference to advisability of further action to require Debtor's Trustee to file such reports;

Correspondence with White & Case with reference to payment of interest on Kansas City, Memphis & Birmingham bonds pledged under Fort Scott Mortgage;

Examination and consideration of petition of Debtor's Trustee as to payment of interest on bonds of Kansas City, Memphis & Birmingham Railroad;

Further correspondence with White & Case as to hearing before Special Master on petition for instructions as to payment of interest on Kansas City, Memphis & Birmingham bonds and

1935

as to further steps to be taken to apply to the year 1935 the formula for segregation set forth in Order No. 43;

Approximate time 12 hours

1936

January

Correspondence with White & Case concerning position of Mortgage Trustee with respect to petition of prior lien mortgage trustees for delivery of common stock of Gulf, Mobile & Northern Railway Company;

[fol. 89] Attendance at hearing before Special Master on motion of Debtor's Trustee for instruction as to payment of interest on certain bonds of Kansas City, Memphis & Birmingham Railroad and upon petition of prior lien mortgage trustees with respect to shares of common stock of Gulf, Mobile & Northern Railway Company;

Report to White & Case of proceedings.

Approximate time 8 hours

April

Correspondence with White & Case, and correspondence with Debtor's Trustee re abandonment of certain lines not subject to Fort Scott & Memphis mortgage, also with respect to abandonment of certain lines subject to Fort Scott & Memphis mortgage, and with respect to deposit of proceeds of salvage of any of the later lines abandoned with Mortgage Trustee;

1936

Further correspondence with White & Case as to payment of interest on Kansas City, Memphis & Birmingham bonds pledged with Mortgage Trustee.

Approximate time 1½ hours

June

Correspondence with counsel for Debtor and with White & Case with reference to application for extension of time for filing plan of reorganization;

Consideration of answer of Railroad Credit Corporation to petition for extension of time for filing plan of reorganization;

Attendance at Federal Court;

Approximate time 3 hours

October

Attendance in Federal Court... 1½ hours

December

Attendance in court at hearing on petition of Fort Scott Bondholders' Committee for payment of past due interest;

[Vol. 90] Conference with counsel for Debtor's Trustee as to payment of past due interest;

Examination and consideration of answer of Debtor's Trustee to petition of Fort Scott Mortgage Bondholders' Committee for payment of past due interest;

Correspondence with White & Case regarding same.

Approximate time 5 hours

1937

January

Correspondence with White & Case and counsel for Debtor's Trustee in regard to deposit

1937

with Mortgage Trustee of proceeds of sale of obsolete equipment

Approximate time 3¼ hours

February

Attendance at hearing before Special Master on application of Fort Scott Mortgage Bondholders' Committee for payment of past due interest;

Report to White & Case re same.

Approximate time 8 hours

June

Extended correspondence and conferences with counsel for Debtor's Trustee with reference to proposed sale of locomotives covered by Fort Scott Mortgage and deposit of proceeds of sale with Mortgage Trustee, and to execution of proper certificates and releases in accordance with mortgage;

Correspondence with White & Case concerning petition of Guy Williams for payment of claim for personal injuries as a preferred claim; investigation of history and status of proceedings;

Approximate time 7½ hours

December

Filing and service of copies of memorandum in support of petition of Fort Scott Mortgage Bondholders' Committee for payment of past due interest;

Checking with railroad's lists of parties required to be served.

Approximate time 3 hours

1938

April

Correspondence with White & Case and correspondence with counsel for prior lien mortgage trustees in regard to motion for payment to them of certain collateral and dividends;

Attendance in court regarding same.

Approximate time 2½ hours

July

Conference with counsel for Debtor's trustee and attendance in court on above motion;

Correspondence with White & Case regarding proposed removal of certain roundhouse facilities at Springfield, Missouri.

Approximate time 4 hours

August

Examination of railroad's records with respect to value of roundhouse facilities at South Springfield, Missouri, and examination of proposed orders with respect to deposit of proceeds of sale with Mortgage Trustee;

Correspondence re same.

Approximate time 3 hours

September

Correspondence and conferences with counsel for Debtor's Trustee regarding deposit with Mortgage Trustee of proceeds of salvage of certain obsolete locomotives and cars.

Approximate time 1 hour

November

Correspondence regarding petition of prior lien mortgage trustees for delivery of certain securities and obligations of subsidiary companies.

Approximate time ¾ hour

[fol. 92] The foregoing comprises only those matters which required the specific and substantial attention of this firm.

In addition, affiant undertook to read all petitions, orders and applications, etc. received during the course of the proceedings to determine whether or not the same might be of interest or of possible interest to the Bankers Trust Company, as trustee under the Fort Scott Mortgage. In a great many cases where such matters might be of possible interest, request was made to White & Case for instructions as to any action to be taken. In the case of a larger number having to do with administrative matters which obviously did not affect the interests of Bankers Trust Company, no such requests were made. Our records show that the total number of such applications, petitions, orders, opinions, etc. (exclusive of accounting reports which were not examined or read and of proposed plans of reorganization, for the examination of which no time is being allotted) amounted to approximately 500, all of which were read and considered.

Affiant is unable to approximate with any degree of accuracy the number of hours involved, except to estimate that the average time for the examination and consideration of such petitions, orders, etc. would be approximately 15 minutes each, requiring a total of 125 hours. It is affiant's best estimate that correspondence of a perfunctory nature not devoted to matters set out specifically above throughout the eight years of the pendency of these proceedings, would be approximately 15 hours.

All of the foregoing services were performed under the direct supervision of affiant who is the senior partner of this firm. All of such services, except for attendance in court with respect to settings and attendance at a number of hearings before the Special Master and examination and checking of records in court or at the offices of [fol. 93] the railroad, were personally performed by the affiant, who has been a member of the Bar of the State of Missouri since 1899, and has had long experience in corporate and railroad equity receiverships and reorganizations both before and after 1932. Those hearings not attended by the affiant personally were attended by Mr. Crawford Johnson, who has been a member of the Bar of the State

of Missouri since 1925 and a member of this firm since 1936, and who has had extensive experience since 1931 in corporate and railroad equity receiverships and reorganizations. The negligible balance of the services was performed by associates of the firm.

In so far as possible, there has been no duplication by this firm of services performed by White & Case.

Affiant further states that a detailed statement of all expenses incurred by this firm in connection with these proceedings is set forth herewith below:

1/ 9/33	Telegram	\$.82
2/ 3/33	Telephone calls	11.70
12/ 6/33	Telegrams	1.29
1/12/34	Telegram94
2/ 7/34	Telegrams	3.21
3/ 6/34	Telegrams	4.93
11/30/34	Postage39
7/ 8/35	Telegram	1.00

\$24.28

RHODES E. CAVE.

Subscribed and sworn to before me this 6th day of February, 1941.

RUTH F. WEAKLY,
Notary Public.

(Seal)

My commission expires July 4, 1941.

[fol. 94]

Schedule C.

Kansas City, Fort Scott and Memphis
 Railway Company
 Refunding Mortgage Dated August 23, 1901

Disbursements of Bankers Trust Company as Trustee, up to
 and including January 31, 1941:

I. Payments to Counsel:

Messrs. White & Case, New York, N. Y.
 in reimbursement for expenses in-
 curred, as follows:

Bill dated December 31, 1932

1932

Dec. 24	Telegram	\$ 1.70
31	Telegram	5.10
		<hr/>
		\$ 6.80

Bill dated March 8, 1933

1933

Jan. 3	Telephone tolls	\$ 15.90
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Bill dated March 26, 1934

1933

Nov. 18	Telegrams	\$ 1.40
Dec. 29	Postage on Air Mail	21.83

1934

Jan. 4	Postage	14.51
20	Telegrams	6.95
Feb. 26	Telegrams	2.29
		<hr/>
		\$ 46.98

Bill dated October 24, 1934

1934

Mar. 31	Telegram	\$ 2.73
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[fol. 95] Bill dated November 17, 1937

1936

Nov. 28	Printing petition for leave to in- tervene before Interstate Com- merce Commission	\$ 21.69
Dec. 1	Expense trip to Washington by Mr. Hueston—three days	43.50
12	Telegram	1.51
		<hr/>
		\$ 66.61

Bill dated March 1, 1939

1938

May 14 Telephone tolls for May.....\$ 3.70

Nov. 1 Expense of trip to Washington
by Mr. Hueston—two days—to
attend hearing before the In-
terstate Commerce Commission:
Carfare\$16.04
Hotel 5.00
Meals 5.05
Miscellaneous 3.15 29.24

\$ 32.94

Bill dated April 1, 1939

1937

Dec. 13 Postage\$.84

1938

Feb. 15 Telephone tolls for February.... 1.35

Apr. 9 Telegrams 4.89

\$ 7.08

Bill dated December 30, 1939

1939

July 8 Telegram\$.95

Total Paid to Counsel..... \$179.99

[fol. 96] II. Payments for Printing:

The Ballou Press, New York, N. Y. in
payment of their bills:

Bill dated January 6, 1934

Printing Petition for leave to intervene;
petition for order granting leave to in-
tervene and Order granting leave to in-
tervene in Court Reorganization pro-
ceedings including alterations, proofs
and cancellations\$484.25

New York State Sales Tax..... 4.85

\$489.10

Bill dated January 17, 1934

1934

Jan. 16 Printing Brief in support of Petition of Bankers Trust Company and Walter W. Smith, as Successor Trustees under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Co. etc.....\$ 8.50
New York State Sales Tax..... .09

\$ 8.59

Total Paid for Printing..... \$497.69

[fol. 97] III. Miscellaneous expenses of Bankers Trust Company:

Expenses of trip to Washington, D. C. on February 8 and 9, 1938, made by A. W. Bachman and H. Ahrens of Bankers Trust Company and F. McGrew of White & Case

Transportation\$47.70
Hotels 19.85
Meals 11.85
Taxi 1.50
Telephone calls35
Sundry 3.80 \$85.05

Registered mail postage and insurance costs 5.15

Total of Miscellaneous Expenses.\$ 90.20

Grand Total \$767.88

[fol. 98] Petition of Bankers Trust Company as Corporate Trustee Under the Refunding Mortgage of The Kansas City, Fort Scott & Memphis Railway Company for allowance of Compensation and Expenses.

(Filed February 15, 1941.)

[Petition for Allowance No. 267.]

To the Honorable Judges of the District Court of the United States, for the Eastern District of Missouri:

The petition of Bankers Trust Company as Corporate Trustee under the Refunding Mortgage, dated August [fol. 99] 23rd, 1901, of The Kansas City, Fort Scott & Memphis Railway Company, respectfully shows:

1. That Petitioner (hereinafter sometimes called the "Corporate Trustee") is and has been since March 24, 1903, a corporation duly organized and existing under the Banking Laws of the State of New York, duly empowered to act as trustee under corporate mortgages, and is Successor Corporate Trustee under the Refunding Mortgage (hereinafter sometimes called the "Mortgage") made by The Kansas City, Fort Scott & Memphis Railway Company to The Mercantile Trust Company and William H. Thompson, as Trustees, a copy of which Mortgage and the Supplements thereto were filed with this Court on December 29, 1933, and the Corporate Trustee begs leave to refer to the same and to the provisions thereof with the same force and effect as if the same were fully set forth herein.

2. That the Mortgage was duly executed, acknowledged and delivered in all respects in conformity with law, and upon the execution and delivery thereof, was properly and duly recorded in each jurisdiction in which the properties described in the granting clauses of the Mortgage were located.

3. That the Corporate Trustee is filing herein its Petition dated February 11, 1941, for its compensation and expenses as Corporate Trustee in the aggregate amount

as in said Petition set forth as a claim secured by a prior lien or charge upon the property covered by the lien of the Mortgage, including the deposited cash held by the Corporate Trustee thereunder, and in form to meet the provisions of the Order in these proceedings No. 242 [fol. 100] dated December 30, 1940, with respect to petitions for compensation for services and expenses incurred otherwise than under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act. In said Petition the Corporate Trustee claims that said Section 77 (c) (12) is not applicable to the Corporate Trustee or if applicable then it challenges the constitutionality of said Section 77 (c) (12), and requests this Court itself to determine the amount and extent of the lien or charge of the Corporate Trustee for its compensation and expenses (including compensation and expenses of its counsel) and for other relief.

4. In order, however, to protect the Corporate Trustee's rights and remedies in the event that (notwithstanding the objections of the Corporate Trustee as stated in said Petition dated February 11, 1941 and notwithstanding the contention therein and herein contained that the services and expenses of the Corporate Trustee have not been rendered or incurred "in connection with the proceedings and plan" and have not been rendered or incurred for the benefit of the Debtor's general estate within the meaning of Section 77 (c) (12) of the Bankruptcy Act) it shall be determined by this Court that said Section 77 (c) (12) is applicable to the Corporate Trustee, the Corporate Trustee files this petition to meet the provisions of the Order in these proceedings No. 242 relating to petitions for compensation for services and expenses incurred under clause (12) of sub-section (c) of Section 77 of the Bankruptcy Act, and this petition is filed without prejudice to or waiver of the prior lien or charge afforded the Corporate Trustee under the Mortgage upon the Mort- [fol. 101] gaged Estate, including deposited cash, for payment in full of its compensation and expenses, and without prejudice to or waiver of the contentions set forth in the above mentioned Petition dated February 11, 1941, a copy of which is annexed hereto and all of the allegations of which, Nos. 1 to 32 inclusive, together with the Sched-

ules attached thereto, are made a part of this petition with the same force and effect as if each such allegation were set forth at length herein. The Corporate Trustee reserves its right hereafter to apply for compensation for services rendered and reasonable expenses necessarily incurred and actually disbursed by it after January 31, 1941.

5. That, on information and belief, the services and expenses of the Corporate Trustee as set forth in said Petition dated February 11, 1941 and made a part of this petition, were rendered and incurred by the Corporate Trustee in the execution of the trusts created by the Mortgage and in the exercise of the powers and duties conferred upon the Corporate Trustee thereunder; and that said services and expenses have not been rendered or incurred "in connection with the proceedings and plan" and have not been rendered or incurred for the benefit of the Debtor's general estate within the meaning of Section 77 (c) (12) of the Bankruptcy Act; and that therefore, upon information and belief, said Section 77 (c) (12) of the Bankruptcy Act and the jurisdiction of the Interstate Commerce Commission thereunder do not apply to the Corporate Trustee in respect of the services and expenses constituting the subject matter of this Petition.

[fol. 102] 6. That the reasonable value of said services and expenses is not less than the sum of Twenty-six thousand seven hundred ninety-two and 16/100 Dollars (\$26,792.16).

Wherefore, without prejudice to the aforesaid Petition of the Corporate Trustee dated February 11, 1941, and the claims asserted thereunder or the herein referred to prior lien or charge of the Corporate Trustee upon the Mortgaged Estate, including deposited cash, but subordinately auxiliary thereto and in aid and furtherance thereof, the Corporate Trustee claims:

1. The sum of Ten thousand Dollars (\$10,000) for its services, and
2. The sum of Sixteen thousand seven hundred ninety-two and 16/100 Dollars (\$16,792.16) for its

reasonable expenses necessarily incurred and actually disbursed under the Mortgage.

BANKERS TRUST COMPANY,

By **E. E. BEACH,**

Vice-President.

WHITE & CASE,

BRYAN, WILLIAMS, CAVE &

McPHEETERS,

Counsel for Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage.

Dated, February 13, 1941.

(Verification and copy of Petition dated February 11, 1941, omitted in printing. See Printed Petition for Allowance No. 266, dated February 11, 1941.)

[fol. 103] (Order of District Court permitting Intervention of Reconstruction Finance Corporation.)

(Filed July 7, 1934.)

This cause this day having come on to be heard on the petition of the Reconstruction Finance Corporation for leave to intervene herein, and it appearing to the Court that all parties of record have been duly notified of the hearing, and for good cause shown, the Court being fully advised in the premises, finds that the prayer of said petition for a general intervention should be denied; that the prayer of said petition for a special intervention should be granted, it is therefore,

Ordered, Adjudged and Decreed

That said Reconstruction Finance Corporation is hereby given leave to intervene especially to protect and fully conserve, its rights mentioned in its petition and is hereby admitted and constituted a special party to this cause, with the right to have notice served on its counsel or any of them, to file motions, answers, pleadings, and other papers in said matters to be heard by testimony and by

argument, and to take such other steps and proceedings in this cause as it may deem proper to protect and conserve its said rights, interests and property in the estate of the Debtor or Debtors herein; provided, however, that the Court reserves the right to enter orders pursuant to petitions or motions of the Trustees herein without notice thereof to any party or parties, where, in the judgment of the Court, such notice is not necessary to protect the interests of any such party not served with notice.

It Is Further Ordered that the Trustees of the St. Louis-San Francisco Railway Company are granted twenty days from July 7, 1934, in which to answer said intervening petition.

C. B. FARIS,
United States District Judge.

[fol. 104] Order Allowing Compensation and Expenses to Bankers Trust Company, as Corporate Trustee Under the Refunding Mortgage of The Kansas City, Fort Scott and Memphis Railway Company.

(Filed June 30, 1941.)

[Order No. 296.]

This cause having come on for hearing April 4, 1941, on the petition of Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of The Kansas City, Fort Scott and Memphis Railway Company, for compensation and expenses as such Corporate Trustee, said petition being dated February 11, 1941, and having been filed herein February 15, 1941, and the Court having considered said petition and the arguments of counsel, and being fully advised in the premises, it is

Ordered, Adjudged and Decreed:

1. That paragraph (c) (12) of Section 77 of the Bankruptcy Act, as amended, is not applicable to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of The Kansas City, Fort Scott and Memphis Railway Company, dated August 23, 1901, with respect to its said

claim for compensation and expenses as such Corporate Trustee.

2. That Bankers Trust Company, as such Corporate Trustee, under the provisions of said Mortgage is entitled to reasonable compensation for services rendered and reasonable expenses necessarily incurred and actually disbursed by it as such Corporate Trustee, and under the provisions of said Mortgage such compensation and expenses are a charge on the trust estate subject to said Mortgage.

3. That there is due to Bankers Trust Company, as such Corporate Trustee, (a) the sum of \$10,000 as reasonable compensation for services rendered by it under said Mortgage to and including January 31, 1941, and (b) the sum of \$16,792.16 for reasonable expenses (including compensation to its counsel, White & Case, in the sum of \$10,000, plus \$179.99 expenses, and Bryan, Williams, Cavé & McPheeters, in the sum of \$6,000, plus \$24.28 expenses) necessarily incurred and disbursed by it up to and including January 31, 1941, amounting in the aggregate to \$26,792.16.

4. That Bankers Trust Company, as such Corporate Trustee, is entitled to a proper charge in the aggregate sum of \$26,792.16 upon the cash deposited with it under said Mortgage; and that it be and hereby is authorized to pay and satisfy said charge out of said deposited cash and to take proper credit for such disbursement in accounting for such deposited cash.

GEO. H. MOORE,
District Judge.

Dated June 30, 1941.

[fol. 107] (Order extending time to file Transcript on Notice of Appeal filed in District Court.)

(Filed September 4, 1941.)

On oral application of Reconstruction Finance Corporation, appellant, and for good cause shown, it is ordered that the time for filing transcript in the appeal taken July 28, 1941, by Reconstruction Finance Corporation from the

order numbered 290, dated June 30, 1941, allowing compensation and expenses to Bankers Trust Company, as Corporate Trustee under Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, is hereby extended to September 30, 1941.

Dated this 4th day of September, 1941. ○

CHARLES B. DAVIS,
Judge.

[fol. 108] (Order further extending time to file Transcript on Notice of Appeal filed in District Court.)

(Filed September 26, 1941.)

On oral application of Reconstruction Finance Corporation, appellant, and for good cause shown, it is ordered that the time for filing transcript in the appeal taken July 28, 1941, by Reconstruction Finance Corporation from the order numbered 290, dated June 30, 1941, allowing compensation and expenses to Bankers Trust Company, as Corporate Trustee under Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, is hereby further extended to October 20, 1941.

GEO. H. MOORE,
Judge.

[fol. 109] Designation of Contents for Record on Appeal.

(Filed October 10, 1941.)

To James J. O'Connor, Clerk of the United States District Court of the Eastern Division, Eastern Judicial District of Missouri:

You will please incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals to the Eighth Circuit on the appeal of Reconstruction Finance Corporation from the order of June 30, 1941, on the petition of Bankers Trust Company, as Corporate Trustee

under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, for compensation and expenses.

1. Agreed statement showing how the questions arose and were decided by the Court as provided by Rule 76 of the Rules of Civil Procedure.

2. Order dated September 4th, 1941, extending time for filing transcript to September 30, 1941.

3. Order dated September 26, 1941, extending time for filing transcript to October 20, 1941.

4. This designation of contents for record with service.

5. Clerk's certificate.

6. To be added by the Clerk of the United States Circuit Court of Appeals before printing the following:

a. Petition of Reconstruction Finance Corporation for an appeal, dated July 25, 1941, together with assignment of errors attached thereto.

[fol. 110] b. Order, dated July 28, 1941, allowing appeal consolidating transcript with transcript filed under this designation and extending to September 30, 1941, the time for filing transcript.

c. Order dated day of September, 1941, extending time for filing transcript to October 20, 1941.

d. Citation.

e. Clerk's certificate.

Dated at St. Louis, Missouri this 9th day of October, 1941.

RECONSTRUCTION FINANCE CORPORATION,

By **RUSSELL L. SNODGRASS,**

ROBERT D. EVANS,

HENNINGS, GREEN, HENRY & EVANS,

1130 Boatmen's Bank Building,

St. Louis, Mo.,

Its Attorneys.

[fol. 111] Clerk's Certificate of Transcript.

United States of America,
 Eastern Division of the Eastern, } ss.
 Judicial District of Missouri,

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in case No. 7004, in the Matter of St. Louis-San Francisco Railway Co., In Proceedings For The Reorganization of a railroad, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District this 17th day of October, in the year of our Lord Nineteen Hundred and Forty-one.

JAMES J. O'CONNOR,
 Clerk of U. S. District Court,

(Seal)

By JOHN J. JARVIS,
 Deputy Clerk.

Filed Oct. 17, 1941. E. E. Koch, Clerk.

[fol 112] (Notice of Appeal Filed in United States Circuit Court of Appeals and Acknowledgment of Service.)

In the United States Circuit Court of Appeals
Eighth Circuit.

Reconstruction Finance Corporation,
Appellant,

vs.

Bankers Trust Company, As Corporate
Trustee under Refunding Mortgage
of the Kansas City, Fort Scott &
Memphis Railway Company,

Appellee.

No. 12,089

In the Matter of
St. Louis-San Francisco Railway
Company, a Missouri Corporation,
Debtor.

No. 7004

In Proceedings for the Reorganization
of a Railroad.

To Bankers Trust Company, Trustee, or Bryan, Williams,
Cave & McPheeters, Its Attorneys:

You are hereby notified that the petition of Reconstruction Finance Corporation for an appeal, assignment of errors and order of Judge Moore, dated June 30, 1941, on the petition of Bankers Trust Company, Trustee, for an allowance will be filed with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit on Saturday, July 26th, and will be presented to the Court at St. Paul on Monday, July 28, 1941, at 9:00 A. M. or as soon thereafter as counsel may be heard.

C. M. CLAY,

ROBERT D. EVANS,

Attorneys for Reconstruction
Finance Corporation.

Copy of the petition of Reconstruction Finance Corporation for an appeal, assignment of errors and copy of court

[fol. 113] order dated June 30, 1941, granting an allowance to Bankers Trust Company, Trustee, and copy of this notice received this 25th day of July, 1941.

**WHITE & CASE,
BRYAN, WILLIAMS, CAVE & McPHEETERS,**
Attorneys for Bankers Trust Company.

FRANK A. THOMPSON,

[Attorneys] for J. M. Kneeland and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor.

[fol. 114] (Petition for Appeal Filed in United States Circuit Court of Appeals.)

In the United States Circuit Court of Appeals
Eighth Circuit

Reconstruction Finance Corporation,
Appellant,

vs.

Bankers Trust Company, as Corporate
Trustee under Refunding Mortgage
of the Kansas City, Fort Scott &
Memphis Railway Company,
Appellee.

No. 12,089.

In the Matter of

St. Louis-San Francisco Railway Com-
pany, a Missouri Corporation,
Debtor.

No. 7004

In Proceedings for the Reorganization
of a Railroad.

To the Honorable Judges of the Court of Appeals for the
Eighth Circuit:

Reconstruction Finance Corporation, your petitioner,
who is an intervener in the above entitled cause, feeling
aggrieved by the order of the Honorable George H. Moore,

Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, entered on June 30, 1941, finding that section 77 (c) (12) of the Bankruptcy Act is not applicable to the Bankers Trust Company, Trustee, with respect to its claim for compensation, and allowing compensation and expenses to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company in the total sum of \$26,792.16, on the petition of Bankers Trust Company, Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, for compensation and expenses rendered by it and its attorneys, prays that it may be permitted to take an appeal from the order and judgment to this Honorable Court for the reasons specified in the assignment of errors which is filed herewith.

C. M. CLAY,

Washington, D. C.,

ROBERT D. EVANS,

St. Louis, Mo.,

Attorneys for Reconstruction Finance Corp.

Dated July 25, 1941

[fol. 115] (Assignment of Errors Filed in United States Circuit Court of Appeals.)

In the United States Circuit Court of Appeals
Eighth Circuit

Reconstruction Finance Corporation,
Appellant,

vs.

Bankers Trust Company, as Corporate
Trustee under Refunding Mortgage
of the Kansas City, Fort Scott &
Memphis Railway Company,
Appellee.

No. 12,089.

In the Matter of

St. Louis-San Francisco Railway Com-
pany, a Missouri Corporation,
Debtor.

No. 7004

In Proceedings for the Reorganization
of a Railroad.

Comes now the said Reconstruction Finance Corporation, intervener, appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith prayed for in said cause from the order and judgment of the Honorable George H. Moore, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, entered June 30, 1941, on the petition of Bankers Trust Company, Trustee, for an allowance of compensation:

1. The Court erred in holding that paragraph (c) (12) of Section 77 of the Bankruptcy Act as amended was not applicable to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, dated August 23, 1901, with respect to its said claim for compensation and expenses as such Corporate Trustee;

2. The Court erred in granting the Bankers Trust Company an allowance for services rendered and for expenses, [fol. 116-7] including attorneys' fees, prior to the fixing of maximum limits by the Interstate Commerce Commission as required by paragraph (c) (12) of section 77 of the Bankruptcy Act as amended;

3. The Court erred in not finding that the services of the Bankers Trust Company and its attorneys in connection with the proceedings and plan were within the provisions of paragraph (c) (12) of section 77;

4. The Court erred in granting an allowance to the Bankers Trust Company, as Corporate Trustee, for services which were in connection with the proceedings and plan in the absence of the fixing of a maximum by the Interstate Commerce Commission;

5. The Court erred in not denying the petition of the Bankers Trust Company for allowance of compensation;

6. The Court erred in making an allowance of compensation on the petition of Bankers Trust Company in view of the fact that the Court had theretofore transmitted to the Interstate Commerce Commission an identical petition covering the same services for the fixing of maximum limits which had not been acted upon by the Interstate Commerce Commission.

Wherefore, Reconstruction Finance Corporation, intervenor, appellant, prays that the said order and judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

C. M. CLAY,

Washington, D. C.,

ROBERT D. EVANS,

St. Louis, Missouri,

Attorneys for Reconstruction Finance Corporation.

Dated July 25, 1941

(Endorsed): No. 12089. Notice of Appeal, Petition for Appeal and Assignment of Errors. Filed in U. S. Circuit Court of Appeals on July 26, 1941.

[fol. 118] (Order of United States Circuit Court of Appeals
Allowing Appeals; Time as to Filing of Transcript.)

In the United States Circuit Court of Appeals
Eighth Circuit

No. 12089.

May Term, 1941.

Monday July 28, 1941.

Reconstruction Finance Corporation,
Appellant,

Bankers Trust Company, as Corporate
Trustee under Refunding Mortgage
of the Kansas City, Fort Scott &
Memphis Railway Company,
Appellee.

In the Matter of

St. Louis-San Francisco Railway Com-
pany, a Missouri Corporation,
Debtor.

No. 7004

In Proceedings for the Reorganization
of a Railroad.

The petition of Reconstruction Finance Corporation, in-
tervener in the above entitled cause, for an appeal from the
judgment and order of the Honorable George H. Moore,
Judge, United States District Court, Eastern Division,
Eastern Judicial District of Missouri, dated June 30, 1941,
is hereby granted and the appeal is allowed;

And it further appearing that the Reconstruction Finance
Corporation is taking an appeal in the same matter in
the District Court under the provisions of Rule 73 of the
Rules of Civil Procedure, it is ordered that the appeal
herein granted be consolidated with the appeal taken
under the provisions of Rule 73 of the Rules of Civil Pro-
cedure and that the transcript prepared in accordance

with said Rules of Civil Procedure shall be taken as and for the transcript in this appeal.

It is further ordered that the time for filing transcript in the appeal herein taken is hereby extended to September 30, 1941.

Dated July 28, 1941.

[fol. 119] (Citation Filed in United States Circuit Court of Appeals and Acknowledgment of Service.)

In the United States Circuit Court of Appeals
Eighth Circuit

Reconstruction Finance Corporation,
Appellant,

Bankers Trust Company, as Corporate
Trustee under Refunding Mortgage
of the Kansas City, Fort Scott &
Memphis Railway Company,
Appellee.

In the Matter of

St. Louis-San Francisco Railway Com-
pany, a Missouri Corporation,
Debtor.

No. 7004

In Proceedings for the Reorganization
of a Railroad.

The President of the United States,

To Bankers Trust Company, as Corporate Trustee under
Refunding Mortgage of the Kansas City, Fort Scott &
Memphis Railway Company, Greeting:

You are hereby cited and admonished to be and appear
in the United States Circuit Court of Appeals for the
Eighth Circuit to be holden at the City of St. Louis, State

of Missouri, within 40 days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri in the proceedings above mentioned on the petition of Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of Kansas City, Fort Scott & Memphis Railway Company, for compensation and expenses, to show cause, if any, there be, why the judgment and orders rendered on said petition June 30, 1941, finding that section 77 (c) (12) of the Bankruptcy Act is not applicable to the Bankers Trust Company, [fol. 120] Trustee, with respect to its claim for compensation and allowing compensation and expenses to Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Archibald K. Gardner, Judge of the United States Circuit Court of Appeals for the Eighth Circuit this 28th day of July, 1941.

ARCHIBALD K. GARDNER,
United States Circuit Judge.

Service of a copy of the foregoing Citation is hereby acknowledged this 5th day of August, 1941.

WHITE AND CASE,
BRYAN, WILLIAMS, CAVE & McPHEETERS,
Attorneys for Bankers Trust Co., Trustee.

FRANK A. THOMPSON,
by ROBERT H. CHARLES,
Attorneys for Trustees, St. Louis-San Francisco
Railway Company.

(Endorsed): No. 12089. Citation. Filed in U. S. Circuit Court of Appeals on August 5, 1941.

[fol. 121] (Order of U. S. Circuit Court of Appeals Extending Time to File Transcript on Appeal Allowed by Appellate Court.)

(Order Extending Time to File Record Until October 20, 1941.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 12089

May Term, 1941.

Friday, September 26, 1941.

Reconstruction Finance
Corporation,

Appellant,

vs.

Bankers Trust Company, as
Corporate Trustee, etc.

} Appeal from the District
Court of the United
States for the Eastern
District of Missouri.

On motion of counsel for appellant, consented to by counsel for the appellee, the time for filing transcript of the record from the District Court on the appeal to this Court is hereby extended until October 20, 1941.

September 26, 1941.

*Order granting leave to Interstate Commerce Commission
to file brief Amicus Curiae, etc.*

United States Circuit Court of Appeals, Eighth Circuit

Nos. 12089 and 12147—November Term, 1941

Saturday, February 7, 1942.

RECONSTRUCTION FINANCE CORPORATION, APPELLANT

vs.

BANKERS TRUST COMPANY, AS CORPORATE TRUSTEE, ETC., APPELLEE

Appeals from the District Court of the United States for the
Eastern District of Missouri

Motion of Interstate Commerce Commission for leave to file brief as Amicus Curiae and to be heard in oral argument is called to the Court's attention. Notice of filing of motion has been filed and it appearing that there is no objection to the motion, it is ordered by the Court that leave be, and is hereby, granted to the Interstate Commerce Commission to serve on parties and to file brief as Amicus Curiae on or before March 2, 1942. Action of the Court on the motion in so far as it concerns leave to participate in the oral argument is postponed and application for such leave may be made on or before the day of argument to the Court before which these appeals will be presented.

February 7, 1942.

Order of submission

March Term, 1942—Tuesday, March 10, 1942

These causes having been called for hearing in their regular order upon application of Mr. Daniel H. Kunkel, counsel for Interstate Commerce Commission, leave is granted to him to participate in the oral argument and the Court extends the time for oral argument fifteen minutes to each side, appellant and appellee, so that argument by Mr. Kunkel will not deprive counsel for the respective parties of their allotted time under the Rules.

Argument was then commenced by Mr. Robert D. Evans for appellant, continued by Mr. Daniel H. Kunkel, counsel for Interstate Commerce Commission, as Amicus Curiae, and concluded by Mr. Rhodes E. Cave for appellee.

Thereupon these causes are submitted to the Court on the transcript of the record from the said District Court and the briefs of counsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 12062—May Term, A. D. 1942

RECONSTRUCTION FINANCE CORPORATION, APPELLANT

vs.

BANKERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER REFUNDING MORTGAGE OF THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILWAY COMPANY, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Missouri

No. 12147—May Term, A. D. 1942

RECONSTRUCTION FINANCE CORPORATION, APPELLANT

vs.

BANKERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER REFUNDING MORTGAGE OF THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILWAY COMPANY, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Missouri

June 10, 1942

Mr. Robert D. Evans (Mr. Russell L. Snodgrass, Messrs. Hennings, Green, Henry, and Evans with him on the brief) for appellant.

Mr. Daniel H. Kunkel (Mr. Daniel W. Knowlton, General Counsel for Interstate Commerce Commission, was with him on the brief) for Interstate Commerce Commission, as Amicus Curiae, in support of appellant.

Mr. Rhodes E. Cave (Messrs. White and Case, Thomas S. McPheters, Fitzhugh McGrew, and Herbert F. July were with him on the brief) for appellee.

Before GARDNER, THOMAS, and RIDGEC, Circuit Judges.

RIDGEC, Circuit Judge, delivered the opinion of the court.

This is an appeal from an order of a district court, in bankruptcy, making allowances for services rendered and expenses incurred by the trustee under a refunding mortgage of a railroad company in reorganization under Sec. 77 of the Bankruptcy Act.

At the time the allowance was made to the trustee under the refunding mortgage, the court had before it a plan for the reorganization of the debtor, approved by the Interstate Commerce Commission, and had made an order requiring all parties in interest to

present, within the time limits by the order, their objections to the proposed plan of reorganization, and also to file all claims for compensation for services rendered or for expenses incurred "either under Clause 12 of Subsection (c) of Section 77 of the Bankruptcy Act, or otherwise." The order also directed the clerk of the court, upon the filing of petitions for allowances under the section of the statute mentioned, to forward copies of such petitions to the Interstate Commerce Commission "for the fixing of a maximum limit or limits on the amount or amounts of the allowances to the petitioner or petitioners from the estate of said debtor."

Section 77 (c) (12) of the Bankruptcy Act is as follows:

"Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries, and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)." (11 U. S. C. A. 205.)

In obedience to the order of the court, the appellee filed two petitions for allowance for services rendered and expenses incurred by it in the reorganization proceedings, one being numbered 266 and the other 267. The total amount of the allowance asked in each petition was \$26,792.16, of which \$10,000 was asked for the services of the Bankers Trust Company as trustee under the refunding mortgage, \$16,000 for fees of its counsel, and the balance for expenses.

In petition No. 266, the appellee alleged that the services and expenses for which compensation was asked had not been incurred in connection with the proceedings and plan for reorganization of the debtor. It averred that its services were rendered and expenses incurred as trustee under the refunding mortgage in the performance of its obligations as trustee and for the benefit of the trust estate as distinguished from the debtor's estate; that by the terms of the refunding mortgage it was given a first lien on all property of the trust estate, including certain cash on deposit with it as trustee; and that for the reasons stated, the court had jurisdiction to determine

the amount to which appellee was entitled without the intervention of the Interstate Commerce Commission under the section of the Statute quoted above.

Petition No. 267 was filed by the appellee in order to protect its rights, under the order of the court fixing the time for filing claims, in the event a decision of the court on petition No. 266 should be adverse to it. In this petition appellee asked compensation, under the statute, for the same services and expenses as in petition No. 266, reserving its objection to the jurisdiction of the Interstate Commerce Commission to fix the maximum limit within which its claim might be allowed, and repeating its allegations concerning its right to have its claim adjudicated exclusively by the court. This petition, in compliance with the order of the court, was referred to the Interstate Commerce Commission.

Before action by the Commission upon the second petition, appellee's petition No. 266 came on for hearing in the court, which entered an order allowing compensation in the full amount claimed. It appears in the briefs of the parties that after the hearing in the court, the Commission considered petition No. 267 and entered an order upon it, making allowances in an amount substantially less than that allowed by the court.

The mortgage under which appellee is trustee secured \$47,513,000 aggregate principal amount of bonds of the Kansas City, Fort Scott and Memphis Railway Company, a part of the system of the debtor railroad in reorganization. It was a first lien upon the main line of the debtor between Kansas City and Memphis, a second lien upon the main line between Memphis and Birmingham, and was also secured by certain bonds and common stocks and by approximately \$265,000 in cash on deposit with the corporate trustee. Appellee's claim of a lien upon the property in its hands as trustee is based upon the following provision of the refunding mortgage:

"The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

The mortgage further provided that in the event of a sale of the mortgaged premises by the trustee, under the power granted it, or by virtue of judicial proceedings, the proceeds realized should be applied first to the costs and expenses of the sale and to the payment of a reasonable compensation to the trustees, their agents, and attorneys.

The bankruptcy court, holding that Sec. 77 (c) (12) had no application to claims of the character presented in petition No. 266, ordered that the appellee pay to itself the full amount of its claim out of the cash on deposit with it as trustee under the mortgage. It held that under the provisions of the mortgage the amount of appellee's claim was a proper charge "on the trust estate subject to said mortgage." The court made no finding as to whether the serv-

ices rendered and expenses incurred by the appellee were in connection with the reorganization proceedings and plan, or whether they resulted in any benefit to the trust estate.

This appeal is prosecuted by the Reconstruction Finance Corporation, a party to the reorganization proceedings in the court below by intervention, and is supported by a brief filed on behalf of the Interstate Commerce Commission, as *amicus curiae*. It is urged on behalf of the appellant that the order of the lower court is erroneous in holding that the claim of the appellee was not governed by Sec. 77 (c) (12) of the Bankruptcy Act. The argument in support of this assignment of error is that the evidence establishes that the services of the appellee and its counsel were in fact in connection with the reorganization plan and proceedings within the meaning of the section of the Bankruptcy Act quoted above, and that the bankruptcy court, therefore, is without power or jurisdiction to allow the claim except within the maximum limits fixed by the Interstate Commerce Commission after reference of the claim to the Commission. With this contention we cannot agree.

It is obvious that under Sec. 77 (c) (12) of the Bankruptcy Act the allowances authorized are only those for services and expenses actually rendered and incurred in connection with the reorganization proceedings and plan, and resulting in benefit to the debtor's estate. It is also obvious that the maximum limits within which claims of the character mentioned above may be allowed by the court must first be fixed by the Commission. Nor do we doubt that the intention of the Congress in enacting this section of the bankruptcy statute was sharply to limit the administrative expenses of reorganization proceedings, nor that the bankruptcy court is without power to exceed the limits fixed by the Interstate Commerce Commission with regard to claims of the character governed by the section of the Act in question. *See* *re Chicago, M., St. P. & P. R. Co.*, 121 F. (2d) 371 (C. C. A. 7th); *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230, 121 F. (2d) 791, 798, 799. And see *Hugg v. Crooks*, 122 F. (2d) 366 (C. C. A. 8th); *Straus v. Baker Co.*, 87 F. (2d) 401 (C. C. A. 5th); *In re Central Shorewood Building Corp.*, 90 F. (2d) 725 (C. C. A. 7th), construing similar provisions of Sec. 77B of the Bankruptcy Act, dealing with corporate reorganizations. The validity of this section has been upheld as applied to claims within the purview of the section. *In re Chicago & N. W. Ry. Co.*, 121 F. (2d) 791.

We may also agree with the appellant's contention that the debtor's estate, within the meaning of Sec. 77 (c) (12) of the Bankruptcy Act, includes all of the debtor's property, encumbered and unencumbered, *Continental Ill. Bank & Tr. Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 55 Sup. Ct. 595, 79 L. Ed. 1110, and that the payment of the claim out of property in the hands of appellee as trustee under the refunding mortgage is in fact payment out of the estate of the debtor. But these circumstances are not important in the decision of the present case. The claim of the appellee is not for

services rendered to the debtor's estate nor in connection with the reorganization proceedings and plan within the meaning of the section of the Bankruptcy Act relied on by appellant. Appellee's claim is based upon its contract, expressed in the refunding mortgage, and is for its services to the trust estate required by that mortgage in fulfilling its duty and obligation to the bondholders secured by the mortgage.

Under Sec. 77 of the Bankruptcy Act the bankruptcy court acquired exclusive jurisdiction of all of the property of the debtor railroad wherever situated. But it took possession of the debtor's property subject to all valid claims against it. Appellee, as trustee under a mortgage conveying a large part of the debtor's estate as security for the payment of certain bonds of the debtor, intervened in the reorganization proceedings in order to protect the rights of the bondholders. In any plan of reorganization of the debtor finally adopted, these bondholders were entitled to fair and equitable treatment, and appellee was a proper party to represent them in the reorganization proceedings. By the terms of the trust indenture it was entitled to compensation for its services rendered in behalf of the bondholders. As a general rule the trustee is entitled to compensation out of the trust estate for the services rendered and expenses incurred in the protection of the trust. *Perry on Trusts and Trustees*, Vol. 11, p. 1531; *Restatement, Law of Trusts*, Vol. I, Secs. 242, 244. *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625; *Hallett v. Moore*, 282 Mass. 380, 185 N. E. 474. In the present case the trust estate was charged with a lien to secure the payment for the trustee's services and expenses properly incurred in the administration of the estate. As the bankruptcy court had possession of the trust estate as a part of the debtor's estate, it was necessary for the appellee to apply to that court for the allowance of its claim.

Nor is the fact that the services of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. The officers of appellee and its counsel gave attention to the steps taken in the proceedings and attended hearings before the court and the Commission. They took part in conferences in regard to the status of the proposed plan of reorganization and in meetings held to work out new plans. But appellee was at all times acting primarily in the interest of the bondholders under the refunding mortgage. The fact that the services of appellee on behalf of the trust estate were also beneficial to the reorganization proceedings should add to, rather than detract from, its right to compensation. See cases cited above.

There is nothing in the case of *In re Chicago and N. W. Ry. Co.*, 35 F. Supp. 230, 256, contrary to the opinion expressed here. In that case the trustees under a refunding mortgage were asking compensation, not under the terms of the mortgage, but under Sec. 77 (c) (12) of the Bankruptcy Act. The court properly held that it was without

jurisdiction to allow them more than the maximum amount fixed by the Interstate Commerce Commission regardless of whether they were to be paid from the general estate of the debtor or from the property pledged to secure the mortgage under which they were trustees. On the other hand, in *Straw v. Baker Co.*, *supra*, a proceeding under Sec. 77B of the Bankruptcy Act, the court held that a trustee under a mortgage was entitled to compensation out of the property pledged under the mortgage for services to the trust estate.

No criticism is offered by appellant concerning the account of the allowance to appellee except such as may be implied in its contention that the court had no jurisdiction to make an allowance greater than the maximum amount fixed by the Commission on petition No. 267. But the Commission was measuring the reasonable value of appellee's services in the reorganization proceedings to the estate of the debtor. Appellee is not asking for compensation for that service. On the other hand it asks reasonable compensation for the value of its services to the trust estate. We find nothing in the record which would justify us in overruling the decision of the bankruptcy court upon the necessity or propriety of the services rendered by the appellee to the trust estate nor upon the value of the services rendered. We are not advised in this record of the terms of the proposed reorganization plans pending before the court nor the treatment accorded by the reorganization plan to the interests represented by the trustee. These facts and others material to the decision of the lower court, concerning which the record on appeal gives no information, were before the lower court and presumably justified its judgment in this case.

We think the claim of the appellee was within the jurisdiction of the court below to allow without the intervention of the Interstate Commerce Commission under Sec. 77 (c) (12).

The judgment appealed from is affirmed.

THOMAS, Circuit Judge, dissenting:

I think the court erred in allowing the trustee's claim under petition No. 266 without findings of fact or conclusions of law and in effect holding that Sec. 77 (c) (12) (11 U. S. C. A. 205 (c) (12)), is not controlling. This section is specifically made applicable to "trustees under indentures", and a procedure with right of appeal is prescribed for determining the amount of such claims and for their allowance. The indenture in this instance creates a lien but does not fix its amount.

In my opinion the trustee should have proceeded under its petition No. 267. Even though it claims subsection (c) (12) is unconstitutional, if applied to its claim, it nevertheless should be required to present the facts in the prescribed administrative proceeding. It could then raise, and ultimately present for judicial review, any legal question which may arise. *Anniston Mfg. Co. v. Davis*, 301 U. S. 237; *Alabama Power Co. v. Icken*, 302 U. S. 464; *Massachusetts v. Mellon*, 262 U. S. 447; *Wilshire Oil Co. v. United States*, 205 U. S. 100. It is not clear to me that a district court sitting as a court of

bankruptcy has power in a bankruptcy proceeding to ignore the statute prescribing a means for determining the amount of unliquidated and disputed claims and to act upon such claims outside the statute.

Even if this court should hold that subsection (c) (12) is not applicable and that the court should properly allow claim No. 266, then the case should be remanded for findings of fact and conclusions of law by the bankruptcy court. See *Kelso v. Maclaren, Trustee*, 8 Cir., 122 F. 2d 867, and *Order 47 of General Orders in Bankruptcy*, 305 U. S. 681, 702.

Judgment

United States Circuit Court of Appeals, Eighth Circuit

May Term, 1942—Wednesday, June 10, 1942

No. 12089

RECONSTRUCTION FINANCE CORPORATION, APPELLEE

vs.

BANKERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER REFUNDING MORTGAGE OF THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILWAY COMPANY

Appeal from the District Court of the United States for the Eastern District of Missouri

No. 12147

RECONSTRUCTION FINANCE CORPORATION, APPELLANT

vs.

BANKERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER REFUNDING MORTGAGE OF THE KANSAS CITY, FORT SCOTT AND MEMPHIS RAILWAY COMPANY

Appeal from the District Court of the United States for the Eastern District of Missouri

These Causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the order of the said District Court appealed from in these causes be, and the same is hereby, affirmed with costs; and that the Bankers Trust Company, as Corporate Trustee under Refunding Mortgage of the Kansas City, Fort Scott and Memphis Railway Company, have and recover against the Reconstruction

Finance Corporation, the sum of Twenty Dollars for its costs herein and have execution therefor.

JUNE 10, 1942.

Clerk's certificate

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in certain causes in said Circuit Court of Appeals wherein the Reconstruction Finance Corporation was Appellant, and the Bankers Trust Company, as Corporate Trustee under Refunding Mortgage of the Kansas City, Fort Scott, and Memphis Railway Company, was Appellee, No. 12089, and wherein the Reconstruction Finance Corporation was Appellant, and the Bankers Trust Company, as Corporate Trustee under Refunding Mortgage of the Kansas City, Fort Scott, and Memphis Railway Company, was Appellee, No. 12147, as full, true and complete as the originals of the same remains on file and of record in my office.

I do further certify that on the twenty-ninth day of July, A. D. 1942, a mandate was issued out of said Circuit Court of Appeals in said causes, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In Testimony Whereof, I hereto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 21st day of August, A. D. 1942.

[SEAL]

E. E. KOCH,

*Clerk of the United States Circuit
Court of Appeals for the Eighth Circuit.*

Supreme Court of the United States

No. 387, October Term, 1942

Order allowing certiorari

Filed October 26, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 388, October Term, 1942

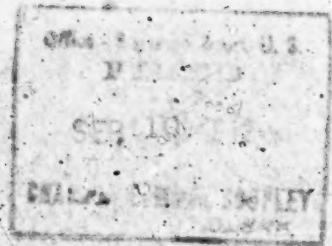
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Filed October 26, 1942

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And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY



Nos. 387 - 388

In the Supreme Court of the United States

OCTOBER TERM, 1942

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

BANKERS TRUST COMPANY, TRUSTEE

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

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CITATIONS

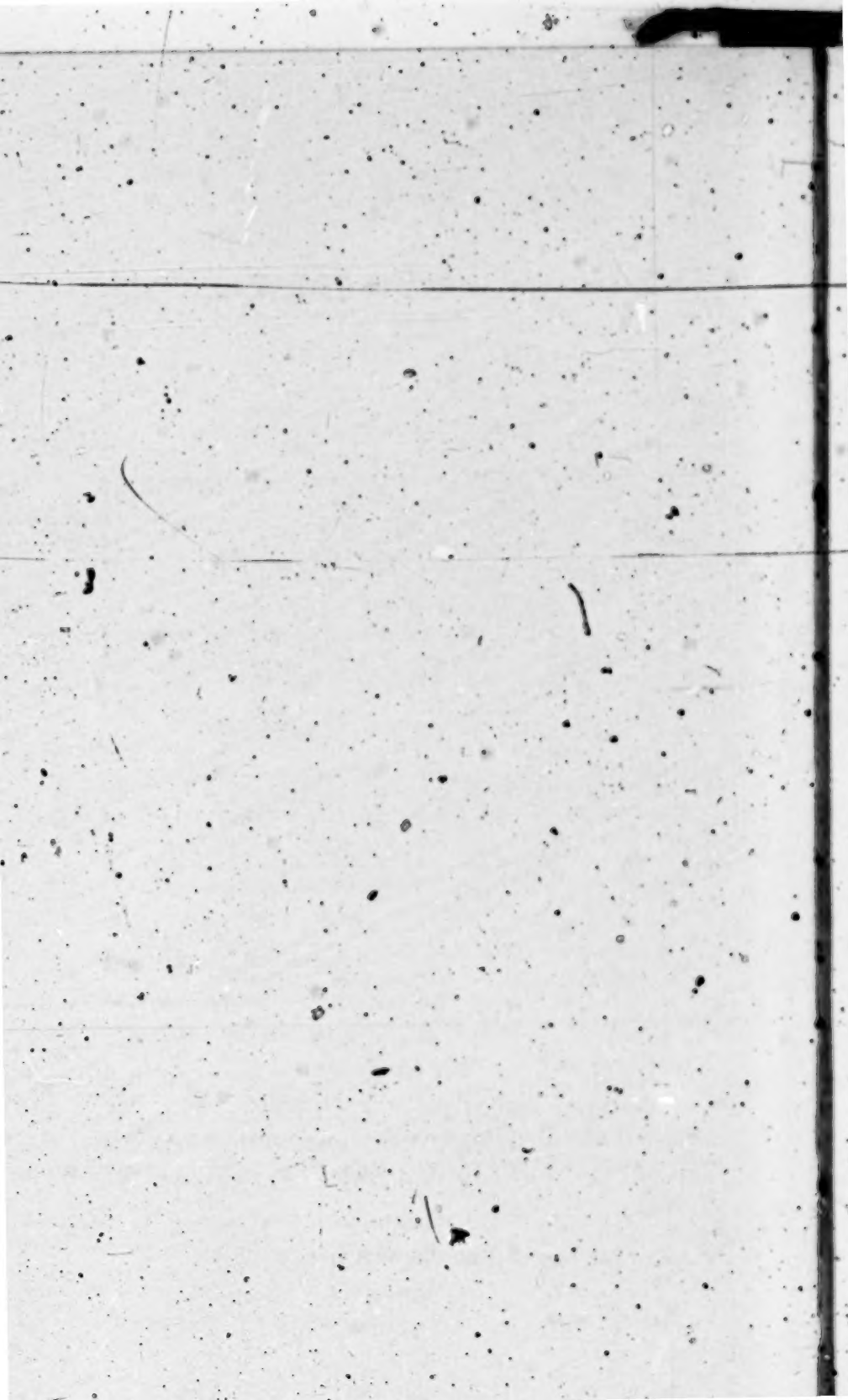
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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. —

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

BANKERS TRUST COMPANY, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Reconstruction Finance Corporation, a public corporation created by Act of Congress,¹ prays that writs of certiorari issue to review the decree of the Circuit Court of Appeals for the Eighth Circuit rendered in this cause on June 10, 1942. The decree affirmed an order of the District Court of the United States for the Eastern District of Missouri, making an allowance for services rendered and expenses incurred by the trustee under an indenture of a railroad company in reorganization under Section 77 of the Bankruptcy Act without utilization of the procedure directed by Section 77 (e) (12).

¹ Act of January 22, 1942, c. 8, 47 Stat. 5.

OPINIONS BELOW

The opinion and order of the District Court (R. 87-88) is not reported; the opinion of the Circuit Court of Appeals (R. 102) is reported in 129 F. (2d) 122.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on June 10, 1942 (R. 108). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 24 (c) of the Bankruptcy Act.

QUESTION PRESENTED

Whether the District Court having jurisdiction over a railroad reorganization under Section 77 of the Bankruptcy Act may make an allowance to an indenture trustee for services rendered in connection with the proceedings and plan without prior reference to the Interstate Commerce Commission for the setting of a maximum in accordance with the procedure provided by Section 77 (c) (12) of that Act.

STATUTE INVOLVED

Section 77 (c) (12) of the Bankruptcy Act provides:

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reason-

able expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c). [11 U. S. C., Sec. 305 (c) (12).]

STATEMENT

The St. Louis-San Francisco Railway Co. (hereinafter sometimes referred to as "Frisco") filed

4

its petition, on May 16, 1933, under the provisions of Section 77 of the Bankruptcy Act in the District Court for the Eastern District of Missouri. This petition was approved by the court on May 17, 1933. (R. 2.) Part of the Frisco system was formerly known as the Kansas City, Fort Scott & Memphis Railway Co., and Bankers Trust Company, respondent herein, is the successor corporate trustee under the refunding mortgage covering that line and certain other property of the Fort Scott & Memphis Railway Co. (R. 2-3.) Bankers Trust Company petitioned for and was granted leave to intervene both before the District Court (R. 24) and before the Interstate Commerce Commission. (R. 25.) The indenture trustee has thus been a party to the proceedings for the reorganization of the Frisco, both before the District Court and before the Interstate Commerce Commission and it has participated in such proceedings. (R. 10, 14-33.)

On December 30, 1940, the District Court, having before it a plan for the reorganization of Frisco approved by the Interstate Commerce Commission, directed the filing of:

All petitions for allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred either under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act or otherwise * * * [R. 6, 7.]—

Pursuant to this order, the indenture trustee filed two petitions for allowance for services rendered and expenses incurred by it in the reorganization proceedings, the one being numbered 266 and the other 267. The total amount of the allowance asked in each petition was \$26,732.16, of which \$10,000 was asked for the services of the Bankers Trust Company as trustee under the refunding mortgage, \$16,000 for fees of its counsel, and the balance for expenses. (R. 14, 30-31, 83, 85.) In Petition No. 267 compensation is asked pursuant to Section 77 (c) (12) for the identical services and expenses covered by Petition No. 266, but the right to object to the jurisdiction of the Interstate Commerce Commission is reserved. This petition, in compliance with the order of the court, was referred to the Interstate Commerce Commission for the setting of a maximum. (R. 3.) Before action by the Commission upon Petition No. 267, Petition No. 266 came on for hearing before the District Court.

In Petition No. 266, the indenture trustee alleged that the services and expenses for which compensation was asked "have not been rendered or incurred 'in connection with the proceedings and plan'" for the reorganization of debtor but were rendered and incurred as trustee under the indenture in performance of its obligations thereunder for the benefit of the trust estate as distinguished from the debtor's estate. (R. 26-27.) By the terms of the indenture it was provided (R. 17):

The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate.

The petition was opposed by the trustees of the debtor and by the Reconstruction Finance Corporation, a party by intervention (R. 3-4, 86). The District Court on June 30, 1941 held (R. 87), without giving reasons, that Section 77 (c) (12) was not applicable to Petition No. 266, and that under the provisions of the mortgage the claim was a proper charge on the trust estate subject to the mortgage. The court made no finding as to whether the services rendered and expenses incurred were or were not in connection with the reorganization proceedings and plan. It directed the indenture trustee to pay to itself the full amount of its claim out of the cash on deposit with it as trustee under the mortgage. (R. 88.)

Meanwhile, the Interstate Commerce Commission held hearings, as necessitated by Section 77 (c) (12), on the propriety and reasonableness of the amounts claimed by Petition No. 267 and by the petitions of others filed in accordance with the court's order of December 30, 1940. By its report and order of August 27, 1941, the Commission held that it had the right to set a maximum for all

services and expenses covered by Petition No. 267 which were rendered in connection with the proceedings and plan during the pendency² of the Section 77 proceedings. *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 193, 218, 236. Accordingly, the Commission fixed maxima on Petition No. 267 for the indenture trustee and its counsel as follows:

	Amount claimed		Maximum fixed	
	Fee	Expense	Fee	Expense
Bankers Trust Company, Trustee	\$10,000	\$200.00	\$1,000	\$200.00
White & Case, Counsel	75,000	175.00	5,000	175.00
Bryan, Williams, Carr & McPherson, Counsel	5,000	50.00	5,000	55.00
	125,000	\$295.00	11,000	\$295.00

The District Court took no action on this part of the Commission's report and order.

Reconstruction Finance Corporation appealed from the order of the District Court on Petition No. 266 to the Circuit Court of Appeals, both under the provisions of Rule 73 of the Rules of Civil Procedure and by appeal to the discretion of the Circuit Court of Appeals. That court

²The Commission stated: "The maximum limits of allowances fixed hereinafter for this mortgage trustee and its counsel do not embrace any services rendered or expenses incurred in proceedings antedating the reorganization proceedings under section 77, since, in our opinion, allowances for such services and expenses are within the sole control of the bankruptcy court acting pursuant to section 77." (249 I. C. C. at 220.)

granted the latter appeal and ordered that the two appeals be consolidated. (R. 97.) The appeal was supported by the Interstate Commerce Commission which filed a brief *amicus curiae*.

The Circuit Court of Appeals affirmed the judgment of the District Court, holding that the fact that the services were "in a literal sense" incurred in connection with the proceedings and plan was not determinative.

REASONS FOR GRANTING THE WRIT

1. The decision below will, unless reviewed, have an unsettling effect on the administration of railroad reorganizations before both the Interstate Commerce Commission and the courts.

The St. Louis-San Francisco Railway Company is one of twenty-nine railroads or railroad systems now being reorganized under the provisions of Section 77 of the Bankruptcy Act. In most of these proceedings indenture trustees have participated and characteristically there are several indenture trustees in a proceeding. With the exception of Bankers Trust Company as an indenture trustee in the St. Louis-San Francisco and Chicago Rock Island & Pacific Reorganizations, Bankers Trust Company and Irving Trust Company as trustees in the New York, New Haven & Hartford Reorganization, and New York Trust Company as trustee in the Fort Dodge, Des Moines & Southern Reorganization, all indenture trustees have filed petitions for allowance under

the procedure provided by Section 77 (c) (12) requiring forwarding by the court to the Commission for the setting of maxima. Thus far mortgage trustees have filed ninety-seven petitions for compensation and allowance under the terms of Section 77 (c) (12) and their counsel have filed one hundred seventy-four petitions supplementary thereto.

The present decision marks the first successful attack on the application of Section 77 (c) (12) to indenture trustees. The District Court for the District of Connecticut dismissed a similar attack by Bankers Trust and Irving Trust Companies in *Matter of the New York, New Haven and Hartford Railroad Company*, Debtor, No. 16562, in a well-considered opinion by Judge Hincks which is set forth in Appendix A, *infra*, p. 15. Subsequently the opinion of the court below was brought to the attention of Judge Hincks in a petition for rehearing, which he denied on June 24, 1942, stating:

This petition for rehearing is based upon a decision in the Eighth Circuit entered a week subsequent to my decision on Petition for Order 492, in a reorganization matter under Section 77, wherein Bankers Trust Company had participated as Trustee of a mortgage on the Kansas City, Fort Scott and Memphis Railway Company.

While I appreciate the opportunity thus afforded me to reconsider my conclusions in the light of that decision, my views are

such that, even after a careful reading of that decision, I feel constrained to adhere to my original decision in the absence of direct appellate mandate to the contrary. [Pr. Ct. Rec. p. 9561.]

Notice of appeal has been given and petitions for leave to appeal have been filed with the Circuit Court of Appeals for the Second Circuit. Similarly, the District Court for the Southern District of Iowa had held, in a decision now superseded by that of the court below, that prior reference to the Commission must be made of all claims for fees and expenses of indenture trustees. *In the Matter of the Fort Dodge, Des Moines & Southern Railroad Co.*, unreported, see Appendix B, *infra*, p. 25. In a third case, *In the Matter of the Chicago, Rock Island and Pacific Ry. Co.*, in the District Court for the Northern District of Illinois, wherein briefs were filed in September, 1941, the court is apparently awaiting the outcome of the case at bar.

The decision below overturns the settled practice of the Interstate Commerce Commission, which has repeatedly held that under Section 77 (c) (12) it is granted jurisdiction to set maxima on all services relevant to the plan and proceeding whether rendered by indenture trustees or by others. See especially *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. Reorganization*, 242 I. C. C. 113; *Erie Railroad Co. Reorganization*, 242 I. C. C. 517; *New York, New Haven &*

Hartford Railroad Company Reorganization, 247 I. C. C. 677; and *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195, 220, 236 (applying this rule to Petition No. 267).

2. The decision below, unless reviewed and reversed, will tend to increase the delay and expense of reorganization proceedings, and thus subvert two of the primary objectives of Section 77. See *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & Pac. Ry. Co.*, 294 U. S. 648, 685. It cannot be doubted that the decision will breed controversy and litigation in the twenty-nine pending proceedings. And if other courts should follow the decision, which, it will be noted, awarded the indenture trustees the full amount of their claims, the allowances out of the debtor's estate for fees and expenses are likely to be materially increased. This result would follow from an acceptance of respondent's theory that there are two sets of criteria for compensation: one applicable by the Commission in a proceeding under Section 77 (c) (12), and the other by a court in a proceeding for determining the amount of a mortgage lien for expenses. The theory was specifically rejected by Judge Hincks in the opinion heretofore mentioned (see Appendix A, *infra*, p. 19). Should it, however, be adopted, the effect may be forecast from an analysis of claims by mortgage trustees and maximum allowances thereon by the Commission in nine of the largest reorganizations, including

the present one. The figures set forth in Appendix C, *infra*, p. 27, show that the maxima allowed to such trustees have aggregated 37.4 per cent of their claims, as compared with allowances of 47.9 per cent of the amounts claimed by all parties (excluding debtor's trustees, reorganization managers and their counsel). The amounts claimed by mortgage trustees were 36.6 per cent of the total claims of all parties, and the allowances were 28.6 per cent of the total allowances to all parties.

3. The decision below is, we submit, unsupportable in the light of the plain language of Section (77) (c) (12), which expressly embraces

an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, * * *

It was acknowledged by the majority of the court below that the allowance in question is to be paid "out of the estate of the debtor", which includes encumbered and unencumbered property of the debtor (R. 105). Nor was it denied that the services were rendered in connection with the reorganization proceedings and plan, in a factual sense (R. 106). The basis of the decision, that the trustee was in any event obligated to serve the interests of the bondholders and had a contractual

claim for "reasonable compensation" under the terms of the indenture (R. 17), is in effect a repeal of the applicable portion of Section 77 (c) (12).

The procedure plainly required by the statute raises no constitutional difficulties. The Constitution does not guarantee to respondent a judicial determination of reasonable maximum for compensation; and in any event, the statute permits judicial review of the maximum fixed by the Commission. Section 77 (e) provides:

the judge shall approve of the plan if satisfied that * * * (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, *are reasonable*, are within such maximum limits as fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge * * *. [Italics added. 11 U. S. C. Sec. 205 (e)].

If the judge finds that the amount fixed as a maximum is not reasonable, he may disapprove the plan. Section 77 (e) provides:

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer

the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. [11 U. S. C. Sec. 205 (e)].

It follows that any order of the Commission setting a maximum may be referred back to the Commission where the Court concludes that a plan incorporating such allowances could not be approved.

Finally, any question regarding the reasonableness of a maximum which the Commission has fixed or may fix should be raised after the statutory procedure has been pursued. Cf. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

✓ CHARLES FAHY,
Solicitor General.

✓ CLAUDE E. HAMILTON, Jr.,
General Counsel,
Reconstruction Finance Corporation.

SEPTEMBER 1942.

APPENDIX A

In the District Court of the United States for the
District of Connecticut

No. 16562

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

IN THE MATTER OF THE NEW YORK, NEW HAVEN
AND HARTFORD RAILROAD COMPANY, DEBTOR

Memorandum of Decision on Motions to Dismiss Petitions for Orders 492 and 611

These petitions are brought each by an indenture trustee, No. 492 by Bankers Trust Company as trustee under the First and Refunding Mortgage and No. 611 by Irving Trust Company as trustee under a Collateral Trust Indenture, asking the Court without reference to or restriction by any maximum allowances set by the Interstate Commerce Commission in these proceedings to adjudicate the amounts on account of the services and expenses of the respective petitioners and their counsel in these proceedings, to decree that the allowances thus established constitute under the provisions of the respective indentures prior liens in favor of the petitioners upon the respective mortgaged properties, or upon securities to be issued to the bondholders secured thereby; and to enforce said liens.

The matter is before the Court upon motions to dismiss these petitions filed and pressed by the

Interstate Commerce Commission through its counsel, by the New Haven Trustees, and by Reconstruction Finance Corp., a collateral noteholder in these proceedings. The petitions have also been opposed by brief in behalf of the Mutual Savings Bank Group.

I

I hold that the services rendered and expenses incurred by the petitioners and their attorneys are covered by the liens of the respective mortgage indentures in so far as said services were reasonably necessary and adapted (a) to protect and advance in these proceedings the interests of the underlying bondholders, (b) to advance the achievement of reorganization, and (c) to protect the mortgage trustee from personal liabilities for which under the mortgage it has a right of indemnity against the debtor's estate.

I cannot accept the view that the petitioners were acting as mere volunteers in the premises. They were acting at least in substantial part under the contract of the trust indenture whereby they were expressly entitled to "reasonable compensation" and to "reimbursement of reasonable expenses, including counsel fees" for all services rendered "in the execution of the trusts hereby created." The indenture was drawn long prior to the enactment of Section 77. It provided that in case of default the petitioner, as also bondholders, might enter upon and operate the mortgaged property for the benefit of all bondholders; also that the petitioner might foreclose the mortgage and obtain a receiver.

I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. Certainly this equitable obligation was not precisely to be measured by their possible liability in an action at law for non-feasance. I find nothing in Section 77 which exonerates mortgage trustees from their equitable obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1939. See 15 U.S.C.A. 77bbb and 77ooo (c).

To be sure, the Bankruptcy Act substitutes statutory remedies for the remedies incident to an equity receivership: to the extent that the new remedies vary from the old the course of activity by a mortgage trustee and much of the incidental—but inescapable—detail requires adaptation to that change. But this change did not extinguish any rights or obligations growing out of the mortgage indenture nor transform the status of the petitioners from that of responsible trustees to that of volunteers. And the activities reasonably required for their own protection and for the protection of their bondholders under the exigencies of reorganization under Section 77, as indeed also services contributing to the achievement of reorganization, fell within the lien of the mortgage contracts. Cf. *Straus v. Baker Co.*, 87 Fed. (2nd) 401, at page 408.

I notice that the Commission has made a distinction between "regular and routine services performed in administering the trust, ordinarily covered by an annual maintenance fees" and other "special" services performed in the reorganization proceedings. This distinction seems to me entirely valid. Such routine services cannot constitute allowances in the reorganization proceedings and are not subject to the jurisdiction of the Commission, because they are not "incurred in connection with the proceedings and plan", as specified under subdivision (c) (12). Nevertheless, both the routine services and the services in the reorganization proceedings may be covered by the lien of the mortgage indenture.

II

I hold that all compensable services and expenses of the petitioners which were incurred in connection with the proceedings and plan, fall within the provisions of Section 77 (c) (12).

Just as Section 77 provides a technique of reorganization which does not require the enforcement of mortgage liens, so it contemplates by subdivision (c) (12) a technique for the liquidation and discharge of contractual claims for services which obviates the necessity of the foreclosure of the covering liens. And the fact that the services and expenses of these petitioners happen to be the subject-matter of contract liens no more excludes their allowance from the effect of (c) (12) than the existence of outstanding mortgages operates to immunize the bondholders secured thereby from the other provisions of the

Act which contemplate that their claims may be discharged by the substitution of securities of equivalent value under a plan which satisfies the requirements of the Act. The petitioners' contract provided that they should receive reasonable compensation and reimbursement. The same standard of liquidation is prescribed by Section 77. Only the method and the forum for accomplishing the liquidation is changed.

The language of (c) (12) specifies a single method which shall apply to all parties alike. That Congress indeed intended that subdivision (c) (12) should apply to Indenture Trustees who might happen to have a lien, as well as to other parties in interest and committees who were without a lien, abundantly appears from the legislative history of the Act. There is thus no occasion for the modification of the inclusive language of (c) (12) by the process of construction.

And certainly the construction advanced by the petitioners is inadmissible. They point to the language of (c) (12) under which the court may order the allowances thereby authorized to be paid "out of the debtor's estate". I agree that this language is broad enough to authorize in a proper case payment from the free (unmortgaged) assets of the estate. In this respect, perhaps the Act goes further than the equitable rule whereby allowances for services in behalf of mortgaged property might be charged against the mortgaged assets. But I cannot agree that the scope of (c) (12) is limited to such allowances as may only be charged against the general (unmortgaged) estate. The language used, viz., "the debtor's

estate", is broad enough to include the mortgaged assets as well as the free assets. And if the enforcement provisions of (c) (12) are entitled to this broad construction, as I hold, there is no room left for the argument that the liquidation provisions of (c) (12) with the accompanying grant of jurisdiction to the Commission must by a narrower process of construction be confined to services not covered by lien.

III

Nor is the Act, thus construed, unconstitutional.

The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648. Cf. *Wright v. Union Central Life Ins. Co.*, 311 U. S. 273, at 279.

The petitioners further complain that under the Act, as I have construed it, they are deprived of all right to judicial review of a decision by the Commission which seems to liquidate, at least in one dimension, their contractual right to compensation. This complaint is unfounded.

For under subdivision (c) (2) the Judge may approve a plan only if "satisfied" that all allowances "for expenses and fees incident to the reorganization . . . are within such maximum limits as are fixed by the Commission" and are "reasonable". Thus the petitioners' liens

can be extinguished through a discharge of their claims in these proceedings only if the maxima set by the Commission are such that the allowances made thereunder by the Judge are found by the Judge to be reasonable.

And if the Judge shall not be satisfied that such maxima permit of allowances which are reasonable, under the Act the Judge may return the petition for reconsideration by the Commission. Such is the view of the parties opposing petitions 492 and 611, including counsel for the Commission. The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as "reasonable" although convinced that it was inadequate. Such a law would stultify both author and agent. Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible creditor and class participation in reorganizations. This policy, in a sense, is paramount to the policy of economy in administration; were it otherwise the Act would have prohibited all allowance of compensation to the parties from the estate. But plainly Congress did not want costless reorganizations rather than just reorganizations. It follows that the true policy relating to economy is one adapted to preclude excessive expense,—not to enforce inadequate compensation. Thus understood, the policy collides not at all with that of encouraging useful and responsible creditor representation by the allowance of adequate compensation through which that objective can be achieved.

This view is also completely in harmony with the underlying scheme of the Act. For the Act charges the Commission with the responsibility of determining values and of formulating plans. Yet the plans thus reported can be approved by the Judge only if he is satisfied that they are fair; if not thus satisfied, unless he dismisses the proceedings, he can only return the plan to the Commission for further consideration. And so as to a maximum allowance set by the Commission. The Judge can approve the plan only if satisfied that all allowances are within the maxima set by the Commission *and are reasonable*; failing that, he can only dismiss the proceedings or "refer the proceedings back to the Commission for further action" (subdivision (e), second paragraph). Surely under this provision if the Judge's disapproval were limited to the maxima set by the Commission upon specified petitions for allowances, he need not refer back the substantial provisions of a reported plan: a re-reference of those specified petitions would suffice, accompanied by his "opinion stating his conclusions and the reasons therefor."

To be sure, this seems a cumbersome procedure for the liquidation of an allowance. Indeed, theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization. Yet from a practical standpoint, as Congress apparently perceived, in almost every case in which reorganization is indeed feasible a considered exchange of views between the Commission and the Judge will result in a final agreement purged of

inadvertence and extravagance which shall permit of a fair appraisal of services under the particular eye of the Commission and services relating principally to activities before the Judge. Anyhow, Congress deemed it wise to condition the privilege of reorganization upon such an agreement. And if ever a case shall arise resulting in a final deadlock instead of agreement, perhaps the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission. However that may be, the petitioners here cannot justly complain that their rights have been insulated from judicial review when judicial sanction is required for the liquidation and discharge of their claims in the bankruptcy proceedings and in the event that the bankruptcy proceedings are dismissed their claims and covering liens are left unimpaired for adjudication elsewhere.

Thus any question as to the validity of an exclusive grant of jurisdiction to the Commission to fix, or even limit, allowances is not involved under the Act. And there is no basis for the constitutional objection which the petitioners invoke.

On these conclusions, the motions to dismiss petitions 492 and 611 must be granted. For these petitions are neither appropriate nor necessary to raise in issue in these proceedings the reasonableness of the maxima allowed by the Commission. That issue was available to the petitioners at the hearing in this court upon their applications for allowances after the Commission

had set maxima under Section 77 (c) (12). On that record without any further expansion, it lay within the power of this Court in these proceedings either to order allowances within the limits of the maxima or to return the applications to the Commission for further action on the ground that the maxima did not permit of adequate compensation.

Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the liens are suspended during these proceedings: they may be enforced only if these proceedings are dismissed.

An appropriate order may be submitted.

Dated at New Haven this 3rd day of June, 1942.

C. C. HINCKS,
United States District Judge.

APPENDIX B

In the District Court of the United States for the
Southern District of Iowa, Central Division

No. 9434—Bkptcy

IN THE MATTER OF THE FORT DODGE, DES MOINES &
SOUTHERN RAILROAD COMPANY, DEBTOR

Order

This matter coming on for hearing on a Special Appearance of The New York Trust Company, as Trustee, challenging the jurisdiction of this court to refer certain questions regarding fees and expenses to the Interstate Commerce Commission. The Interstate Commerce Commission appears and resists the application. Due notice has been given to all parties in interest, and the matter set down for hearing on this date in open court at Des Moines, Iowa. The Interstate Commerce Commission appears by counsel but the New York Trust Company, as Trustee, does not appear by counsel, and the matter being informally discussed and being advised, the Court finds that the Special Appearance referred to should be and the same is overruled and denied.

It is further Ordered that the prior proceedings in this court in referring claims to the Interstate Commerce Commission for action thereon and including all claims for fees and expenses by or

against the New York Trust Company, as Trustee, is confirmed and approved.

The New York Trust Company, as Trustee, excepts.

Signed at Des Moines, Iowa, this 9th day of September, 1941.

(Sgd.) CHAS. A. DEWEY,
Judge, U. S. District Court.

APPENDIX C

As tabulated March 2, 1942, the decisions of the Interstate Commerce Commission in the following nine cases show the following:

Debtor ¹	Amounts claimed			Maximum allowances		
	Mortgage trustees	All parties	Mtg. tr. to all	Mortgage trustees	All parties	Mtg. tr. to all
			<i>Percent</i>			<i>Percent</i>
Chicago Great Western ²	\$44,202	\$235,228	18.8	\$23,702	\$112,867	21.0
Chicago, Milwaukee, St. Paul & Pacific ³	235,240	676,451	34.8	109,609	312,624	35.1
Chicago & Eastern Illinois ⁴	86,751	372,321	23.3	47,271	265,815	17.8
Chicago & North Western ⁵	347,983	822,082	42.3	175,558	442,844	39.6
Denver & Rio Grande Western	419,586	741,454	56.6	129,522	267,080	48.4
Erie	376,959	690,769	54.6	147,358	306,652	48.1
Missouri Pacific ⁶	714,583	1,788,731	39.9	238,569	696,625	26.6
St. Louis-San Francisco ⁷	187,236	1,030,765	18.2	64,051	465,251	13.8
New York, New Haven & Hartford ⁸	703,741	2,155,052	32.7	230,691	1,005,837	22.9
Total	3,116,281	8,512,853	36.6	1,166,391	4,076,195	28.6

¹ Debtor's trustees and their counsel (regular and special) not included in any case.

² Reorganization Managers' and their counsel expenses excluded; therefore, on comparable basis with other cases.

³ Does not reflect allowance to Robert E. Smith, June 7, 1941, as secretary and expert for stockholders' committees.

⁴ Includes only those claims which are applicable to the reorganization proceeding.

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DEC 10 1942
CHARLES CLAYTON

Nos. 387, 388.

**In The
Supreme Court of the United States**

OCTOBER TERM, 1942.

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

v.

BANKERS TRUST COMPANY, TRUSTEE.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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**In The
Supreme Court of the United States**

OCTOBER TERM, 1942.

Nos. 387-388.

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

v.

BANKERS TRUST COMPANY, TRUSTEE.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT,

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion and order of the District Court (R. 87-88) is not reported; the opinion of the Circuit Court of Appeals (R. 102) is reported in 129 F. (2d) 122.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 10, 1942 (R. 108). The petition for certiorari, filed September 10, 1942, was granted on October 26, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Sections 24(c) and 77 of the Bankruptcy Act.

QUESTION PRESENTED.

Whether the District Court having jurisdiction over a railroad reorganization under Section 77 of the Bankruptcy Act may make an allowance to an indenture trustee for services rendered in connection with the reorganization proceedings and plan without prior reference to the Interstate Commerce Commission for the fixing of a maximum allowance in accordance with the procedure provided by Section 77(c)(12) of that Act.

STATUTE INVOLVED.

Section 77(c)(12) of the Bankruptcy Act (47 Stat. 1474, 11 U. S. C., Section 205(c)(12) as amended) provides:

"(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith *by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ.* Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing

if, the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)." (Italics added.)

Other portions of Section 77 are set out in Appendix A *infra*, pages 37-58.

STATEMENT.

The St. Louis-San Francisco Railway Co. (hereinafter sometimes referred to as the "Frisco") filed its petition, on May 16, 1933, under the provisions of Section 77 of the Bankruptcy Act in the District Court for the Eastern District of Missouri. The petition was approved by the court on May 17, 1933. (R. 2.) Part of the Frisco system was formerly known as the Kansas City, Fort Scott & Memphis Railway, and Bankers Trust Company, respondent herein, is the successor corporate trustee under the refunding mortgage covering the line and certain other property of the Kansas City, Fort Scott & Memphis Railway Co. (R. 2-3.) Bankers Trust Company (hereinafter referred to as the Indenture Trustee) petitioned for and was granted leave to intervene before the District Court (R. 24) under Section 77 (c) (13) and before the Interstate Commerce Commission. (R. 25.) The Indenture Trustee has thus been a party to the proceedings for the reorganization of the Frisco, both before the District Court and before the Interstate Commerce Commission, and it has actively participated in such proceedings. (R. 10, 14-33.)

On December 30, 1940, the District Court, having before it a plan for the reorganization of Frisco approved by the Interstate Commerce Commission, directed the filing of:

"All petitions for allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred either under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act or otherwise" [R. 6, 7.]

Pursuant to this order, the Indenture Trustee filed two petitions for allowances, for services rendered and expenses incurred by it in the reorganization proceedings, one being numbered 266 and the other 267. The total amount of the allowance asked in each petition was \$26,792.16, of which \$10,000 was asked for the services of the Bankers Trust Company as corporate trustee under the refunding mortgage, \$16,000 for fees of its counsel, and the balance for expenses. (R. 14; 30-31, 83, 85.) In Petition No. 267 compensation is asked pursuant to Section 77(c)(12) for the identical services and expenses covered by Petition No. 266, but the right to object to the jurisdiction of the Interstate Commerce Commission is reserved. Petition No. 267, in compliance with the order of the court, was referred to the Interstate Commerce Commission for the fixing of a maximum. (R. 3.) Before action by the Commission upon Petition No. 267, Petition No. 266 came on for hearing before the District Court.

In Petition No. 266, the Indenture Trustee alleged that the services and expenses for which compensation was asked "have not been rendered or incurred 'in connection with the proceedings and plan' " for the reorganization of the debtor but were rendered and incurred as trustee under the indenture in performance of its obligations thereunder for the benefit of the trust estate as distinguished from the debtor's estate. (R. 26-27.)

Petition No. 266 was opposed by the trustees of the debtor and by the Reconstruction Finance Corporation, a creditor¹ and a party by intervention (R. 3-4, 86). The District Court on June 30, 1941 held (R. 87), without giving reasons, that Section 77(c)(12) was not applicable to Petition No. 266, and that under the provisions of the mortgage the claim was a proper charge on the trust estate subject to the mortgage. The court made no finding as to whether the services ren-

¹ Reconstruction Finance Corporation holds as pledgee 5.4 per cent of the St. Louis-San Francisco Consolidated Mortgage Bonds under which mortgage 45.6 per cent of the outstanding Kansas City, Fort Scott & Memphis bonds are pledged.

dered and expenses incurred were or were not in connection with the reorganization proceedings and plan. It directed the Indenture Trustee to pay to itself the *full amount* of its claim out of the cash on deposit with it as trustee under the mortgage. (R. 88.)

Meanwhile, the Interstate Commerce Commission held hearings, as required by Section 77(e)(12), on the propriety and reasonableness of the amounts claimed in Petition No. 267 and by the petitions of others filed in accordance with the court's order of December 30, 1940. By its report and order of August 27, 1941, the Commission held that it had jurisdiction to fix a maximum limit for all services and expenses covered by Petition No. 267 which were rendered in connection with the proceedings and plan during the pendency² of the Section 77 proceedings. *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195, 218, 236. In said report the Commission concluded (p. 235): "That in view of the nature and extent of the services rendered by the petitioners; their counsel and technical advisers, the contributive value thereof, and the benefit accruing to the debtor's estate, we should fix the following maximum limits of final allowances to be paid out of the debtor estate . . ." The Commission then fixed maxima on Petition No. 267 for the indenture trustee and its counsel as follows:

	Amount claimed		Maximum fixed	
	Fee	Expenses	Fee	Expenses
Bankers Trust Company, Trustee . . .	\$10,000	\$587.89	\$2,500	\$587.89
White & Case, Counsel	10,000	179.99	3,500	157.29
Bryan, Williams, Cave & McPheeters, Counsel	6,000	24.28	2,000	11.76
	<u>\$26,000</u>	<u>\$792.16</u>	<u>\$8,000</u>	<u>\$756.94</u>

The District Court took no action on this part of the Commission's report and order.

Reconstruction Finance Corporation appealed from the order of the District Court on Petition No. 266 to the Circuit Court of Appeals, both under the provisions of Rule

² This is discussed *infra* p. 25.

73 of the Rules of Civil Procedure and by appeal to the discretion of the Circuit Court of Appeals. (R. 1 and 93.) That court granted the latter appeal and ordered that the two appeals be consolidated. (R. 97.) The appeal was supported by the Interstate Commerce Commission which filed a brief *amicus curiae*.

The Circuit Court of Appeals affirmed the judgment of the District Court, holding that, although the services were "in a literal sense" incurred in connection with the proceedings and plan, that fact was not controlling.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that paragraph (c)(12) of Section 77 of the Bankruptcy Act, as amended, was not applicable to the claim of Bankers Trust Company, as Indenture Trustee under the refunding mortgage of the Kansas City, Fort Scott and Memphis Railway Company, dated August 23, 1901, for an allowance of compensation and expenses for its services in the Section 77 railroad reorganization proceedings as such Indenture Trustee.

2. In affirming the order granting an allowance to Bankers Trust Company, as Indenture Trustee, of compensation and expenses, including attorneys' fees, for services rendered prior to the fixing of maximum limits thereon by the Interstate Commerce Commission as required by paragraph (c)(12) of Section 77 of the Bankruptcy Act, as amended.

3. In finding that, although the services of the Bankers Trust Company and its attorneys were in connection with the proceedings and plan within the provisions of paragraph (c)(12) of Section 77, that fact was not legally controlling.

4. In affirming the order granting an allowance to the Bankers Trust Company for compensation and expenses for services as Indenture Trustee which were in connection with

the proceedings and plan in the absence of the fixing of maximum limits by the Interstate Commerce Commission.

5. In approving the making of an allowance of compensation to Bankers Trust Company, as Indenture Trustee, on Petition No. 266 when Petition No. 267 covering identical services had theretofore been transmitted by the District Court to the Interstate Commerce Commission for the fixing of maximum limits, which Petition had not then been acted upon by the Interstate Commerce Commission.

6. In failing to dismiss Petition No. 266 for an allowance of compensation and expenses.

7. In failing to reverse the order, judgment and decree of the District Court.

SUMMARY OF ARGUMENT

Both the language and the legislative history of Section 77(c)(12) make clear that it was the intent of Congress to include the compensation and expenses of indenture trustees within the regulatory provision.

A study of the fee petitions filed in other railroad reorganization proceedings reveals that the only method of interpreting the statute that would accomplish its purpose, which was to insure reasonable limits on reorganization costs, is to include the compensation and expenses of Indenture Trustees because these have formed about one-third of the total amounts claimed or allowed. See Petition for Certiorari, pp. 12, 27.

The Indenture Trustee contends that since Section 77(c)(12) refers to "an allowance to be paid out of the Debtor's estate", it does not include an allowance which should be paid out of the res subject to its mortgage. This interpretation of "Debtor's estate" is untenable. "Debtor's Estate" as used in Section 77(c)(12) embraces the total assets of the Debtor.

The Indenture Trustee alleged that the services rendered and expenses incurred for which compensation is asked

were not rendered or incurred "in connection with the proceedings and plan" for the reorganization of the Debtor. But the facts demonstrate the contrary. An examination of the Trustee's petition and supporting affidavits demonstrates that the services were in fact rendered in connection with the proceedings and plan. We do not contend that services rendered prior to the reorganization proceedings or routine administrative services are covered by the statutory provision in question.

The Indenture Trustee has argued that it has a vested property right or an inviolable contract right to compensation to be determined by the judgment of a court. We submit that the indenture created no such right. At most a lien for compensation would be inchoate until the services were performed, and here they were performed subsequent to the statute and the institution of the reorganization proceedings. Moreover, the contract right related to foreclosure rather than to bankruptcy reorganization procedure. In any event no such contract right could escape the power of Congress to establish a new procedure under its bankruptcy and commerce powers.

The procedure provided by the statute is subject to no constitutional objection. Whether the maximum allowance fixed by the Commission may be disapproved by the court as inadequate is not entirely clear from the statute, and courts have reached different conclusions on the question. No court, however, has held the procedure invalid. We suggest that the statute permits review by the district court of a maximum fixed by the Commission. In any event, the procedure is constitutional. The function entrusted to the Commission is particularly appropriate for performance by that tribunal. Moreover, the Indenture Trustee is in no position to challenge the procedure since it elected to perform the services and incurred the expenses in question subsequent to the establishment of the statutory procedure, which in fact gives claims for these services and expenses the status of administrative expenses. Finally, statutes making determinations such as that here involved conclusive have repeatedly been sustained.

ARGUMENT.

INTRODUCTORY STATEMENT.

The issue presented in this case, to be resolved intelligently, should be approached from the standpoint of the fundamental purposes of Congress in enacting Section 77 of the Bankruptcy Act, as amended. The purposes of that legislation included, among others, regulation of the costs of railroad reorganization, to the end that those costs should be kept within reasonable bounds in the public interest.³ To implement that regulation, Section 77 conferred on the Interstate Commerce Commission the power to fix maximum limits on the amounts payable for compensation and expenses out of the estates of the bankrupt railroads to various parties interested in reorganization proceedings.

The question here involved is whether a trustee under an indenture of mortgage on a railroad undergoing reorganization is *subject to* or *exempt from* this regulatory power.

The language of Section 77(c)(12), *supra* p. 2, in terms embraces an indenture trustee. The legislative history supports this view of the statutory text. The purpose of the legislation—to keep costs within reasonable bounds—would be in a large measure defeated if mortgage trustees are to be exempted from the statutory regulation.

Before considering Section 77(c)(12) itself, it will be illuminating to summarize the extensive provisions of the Act as a whole as it relates to the broad purpose of Congress to restrict reorganization costs to reasonable bounds and to devise a system of control for such costs. Relevant parts of the Act appear in Appendix A.

The Commission is empowered to fix maximum limits on the compensation of the bankruptcy trustee and of the trustee's counsel, Section 77(c)(2); and it is empowered to authorize the solicitation of proxies, authorizations and deposit agreements, if it finds them reasonable, after consideration of their terms, including the terms therein governing the compensation and expenses of applicant, agents and attorneys for their services, Section 77(p).

³ See *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific Ry. Co.*, 294 U. S. 648, 685.

The court is required to scrutinize those proxies and deposit agreements, which, by reason of their existence prior to August 27, 1935, are not passed on by the Commission, and the court is empowered to restrain the exercise of any power therein found to be unfair, "including the collection of unreasonable amounts of compensation and expenses", Section 77(p). Further, the court is given power to make orders for payment of "reasonable administrative expenses and allowances" incurred in reorganization in any prior proceedings pending at the time the Section 77 proceedings begin, Section 77(i); and to allow to any master "reasonable compensation for his services and actual and reasonable expenses," Section 77(c)(13).

These various provisions, woven into the very fabric of the Act, form a pattern whose unmistakable design reveals the diligence with which Congress sought to effect its purpose to place the costs of railroad reorganization under the firm and continuous control of responsible administrative and judicial agencies. And, with the exception of the rulings below in the case at bar, the courts have uniformly construed the Act in such manner as to carry out the legislative purpose.

The question here involved was passed on by the District Court for the District of Connecticut in the New York, New Haven & Hartford reorganization proceedings. There, in a carefully considered opinion, Judge Hincks ruled adversely on the contentions of Bankers Trust Company, an Indenture Trustee in those proceedings, being the same contentions which it urged in the courts below in this proceeding. The complete text of Judge Hincks' opinion is printed in Appendix B to this brief, *infra*, p. 59. See, in accord: *In re Chicago, M. St. P. & R. Co.*, 121 F. (2d) 371 (C. C. A. 7th); *In re Missouri Pacific R. Co.*, 39 F. Supp. 436 (E. D. Mo.); *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230 (N. D. Ill.); *In re Chicago, G. W. R. Co.*, 29 F. Supp. 149 (N. D. Ill.); *In the Matter of The Fort Dodge, Des Moines & Southern R. Co.*, Appendix C, *infra*, p. 67.

I.

SECTION 77 OF THE BANKRUPTCY ACT VESTS IN THE INTERSTATE COMMERCE COMMISSION JURISDICTION TO FIX THE MAXIMUM LIMITS ON AMOUNTS PAYABLE OUT OF THE DEBTOR'S ESTATE AS COMPENSATION FOR SERVICES RENDERED AND EXPENSES INCURRED BY INDENTURE TRUSTEES (INCLUDING FEES AND EXPENSES OF THEIR ATTORNEYS) IN CONNECTION WITH THE PROCEEDINGS AND PLAN OF REORGANIZATION.

The explicit terms of Section 77(c)(12) embrace allowances to trustees under indentures. That their claims are to be treated no differently from those of the other enumerated classes of persons is the position consistently taken by the Interstate Commerce Commission⁴ and required, we submit, not only by the language of the Act but by its legislative background.

In its report to Congress for 1932 the Commission recommended that the subject of railroad receiverships and reorganizations be considered to the end that needed legislation might be enacted to reduce the time and cost involved. That report, at p. 15, stated that the existing procedure impeded adequate service and imposed on the public and on the security holders losses and expenses that were frequently burdensome and unnecessary.⁵

⁴ See especially *Chicago and Eastern Illinois Railway Company Reorganization*, 233 I. C. C. 267, 273; *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. Reorganization*, 242 I. C. C. 113; *Erie Railroad Co. Reorganization*, 242 I. C. C. 517; *New York, New Haven & Hartford Railroad Company Reorganization*, 247 I. C. C. 677; *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195, 220, 236 (applying this rule to Petition No. 267); and *St. Louis Southwestern Railway Company Reorganization*, 233 I. C. C. 456, 457-59.

The Securities and Exchange Commission, in administering Section 11(f) of the Public Utility Holding Company Act, has taken the same position, the language of the Act being less explicit; "... any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding..." See *West Ohio Gas Co.*, 4 S. E. C. 931, 947; *York Railway Co.*, Holding Company Act Release No. 3876, Nov. 3, 1942.

⁵ 46th Annual Report of the Interstate Commerce Commission, December 1, 1932.

The decision of this Court and the dissenting opinion of Mr. Justice Stone in *United States v. Chicago, Milwaukee, St. Paul & Pacific R. R.*, 282 U. S. 311, brought the problem to a sharp focus. There the Commission, in the exercise of its powers over the issuance of securities, attempted to regulate reorganization expenses by approving the issuance of securities⁶ of the reorganized company upon condition that a special fund created for payment of expenses would be subject to the Commission's control. This Court held that the condition was beyond the Commission's statutory jurisdiction.

In considering the case at bar in relation to the objectives sought to be accomplished in the enactment of Section 77 as disclosed in its language and legislative history, it is noteworthy that in the *Milwaukee* case, *supra*, part of the fund which the Commission attempted to regulate was reserved for the payment of compensation to indenture trustees (282 U. S. 311, 320).

When legislation was introduced on January 21, 1933, in the form of H. R. 14359, providing for railroad reorganizations under the Bankruptcy Act, it contained provision empowering the Commission to fix the specific compensation payable—

"to reorganization managers, special referees, trustees, officers, parties in interest, committees, or other representatives of creditors or stockholders for services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and plan . . ."

A similar bill was introduced in the Senate on January 31, 1933, by Senator Hastings. On February 24, 1933, he submitted an amendment to H. R. 14359 of which paragraph (c)(8) provided for the fixing of maximum limits, as follows:

"(The judge) may, within such maximum limits as are fixed by the commission, as elsewhere provided in subdivision (f) of this section, allow a reasonable compensation for the services rendered and reimbursement

⁶ Interstate Commerce Act, § 20(a).

for the actual and necessary expenses incurred in connection with the proceeding and plan by officers, parties in interest, reorganization managers, and committees or other representatives of creditors or stockholders, and by their attorneys or agents, * * *

The last clause of the above-quoted provision was for clarity amended to read: "and the attorneys or agents of any of the foregoing." On March 1, 1933, the House concurred in the Senate amendment, and the bill became law on March 3, 1933 with paragraph (c)(8), as above quoted, authorizing the Commission to fix the maximum limits for compensation and expenses. 47 Stat. 1474, 1476.

In 1935, Section 77 was revised to correct shortcomings not apparent when the Act of 1933 went into effect. Among other provisions, that with respect to reorganization expenses was amended to limit still more strictly allowances for compensation.⁷ That amended provision is now in force as paragraph (c)(12) of Section 77.

The reports of Congressional Committees⁸ and the discussions⁹ in Congress all show emphatically that the purpose of Congress was to safeguard the new railroad reor-

⁷ The 1933 Act, paragraph (c)(8), differed chiefly from paragraph (c)(12) of the 1935 Act in that it allowed compensation in addition to expenses to all parties in interest. The 1935 Act limits compensation to indenture trustees, depositaries and assistants employed by the Commission. It does not authorize payment of compensation to mere "parties in interest". The change was thus explained by Senator Wheeler (79 Cong. Rec. 13765): "The present provisions of section 77 allow both expenses and fees to be paid to the designated interested parties out of the debtor's estate. This was regarded as an invitation to exploitation. The House Judiciary Committee, consequently, eliminated fees entirely, allowing only expenses. On further investigation, it found that this was too rigorous. The effect of the amendment is to allow expenses to all the interested parties and fees only to trustees under indentures, depositaries, and such assistants as are especially employed by the Commission with the approval of the judge."

⁸ 74 Cong. 1st Session, Senate Report No. 1336, August 16, 1935; 74 Cong. 1st Session, H. R. Report No. 1283, June 21, 1935.

⁹ 76 Cong. R. 2917, 5128, 5129, 5130, 5358; 79 Cong. R. 13307, 13765.

ganization procedure from the evils of extravagant expense that had marked the old receivership foreclosure procedure. Particularly evident is the intent to prevent a recurrence of the evasion of administrative control over reorganization expenses which had been accomplished in the *Milwaukee case, supra*. Discussing the Senate amendment which became law in paragraph 1c) (8) of the Act of 1933, Representative LaGuardia said (76 Cong. R. 5358):

"... We have taken the views in the minority opinion in the Chicago, Milwaukee & St. Paul Railroad case, even to the extent that all incidental and indirect costs, expenses, and fees are subject to the control of the Interstate Commerce Commission, and have written that into the law.

"In this case, you will remember over \$7,000,000 was spent in reorganization. The same gang that is now seeking to defeat this bill appeared as attorneys or counsels or managers in that case and received over \$1,600,000 in fees. There you had a plan approved by the Interstate Commerce Commission and another modified plan approved by the court. This would be impossible under this bill.

"So, all that the House has to decide at this late hour, Mr. Speaker, is whether or not, receiverships being inevitable, under present conditions, we can, as far as the law permits, control these reorganizations, prevent the abuses of the past, prevent the finleting of these railroads, and in the public interest put this under the proper and honest supervision of the Interstate Commerce Commission."

The history of this legislation demonstrates indubitably that there was never any notion that reorganization expenses should be segregated so as to include some under the Commission's power to fix maximum limits and to exclude others. The undoubted purpose was to insure that all expenses of reorganization, payable out of the debtor's estate (as distinguished from private sources) were under the coordinated regulatory power of the Commission and the courts.

This purpose becomes even clearer when it is remembered that the services rendered and expenses incurred by indenture trustees are not distinguishable in character from those rendered by reorganization managers, committees and other representatives of various security holders. The object being to control costs as a whole, it is evident that the exemption of an important class of costs would mark a long step towards the defeat of the legislative purpose.

The language employed in the Act translates this obvious intent into law. The provisions of Section 77 relating to expenses of reorganization are far-reaching. Paragraph (c) (2) provides that the reorganization "trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable." Paragraph (c) (12) provides for the payment out of the debtor's estate within maximum limits prescribed by the Commission of the actual and reasonable expenses incurred in connection with the proceeding and plan by "parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders," by "trustees under indenture, depositaries, and such assistants as the Commission with the approval of the judge may especially employ." Here is a specific reference to indenture trustees. Their claim for reimbursement and compensation is grouped with all other parties in interest and their representatives. Certainly in the broad sweep of powers so granted by a remedial statute—having in mind that no distinction is made with respect to indenture trustees, no special rights conferred or exemption granted by the language of the statute—it cannot be said that the expenses here claimed have been excepted. Such expenses are substantial enough, as is evidenced in this and comparable reorganization cases,¹⁰ to constitute a weighty factor in the formulation and adop-

¹⁰ In nine of the large reorganizations, they constituted 36.6% of all amounts claimed or 28.6% of all maxima fixed. See Table p. 27 of Petition for Certiorari.

tion of a plan of reorganization and justify the assumption that they would have been expressly excluded had that been the legislative intent.

Furthermore, paragraph (c) of Section 77, providing for the approval of the plan, requires that the judge shall satisfy himself that "the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge."

Here the words "incident to the reorganization" are indicative of the scope of the phrase "in connection with the proceedings and plan" as used in paragraph (c) (12). Whether services and expenses arise out of claimed pre-existing contractual rights or otherwise, if they arise in connection with the proceedings and plan or are incidental thereto, they have been made subject to the Commission's power to fix maximum limits.

In the light of the statutory language, to uphold the Indenture Trustee's position requires that the specific terms of the Act be given no effect whatsoever.

II.

"DEBTOR'S ESTATE" AS USED IN SECTION 77(c)(12) EMBRACES THE TOTAL ASSETS OF THE DEBTOR.

The Indenture Trustee contended below that since Section 77(c)(12) refers to "an allowance to be paid out of the Debtor's estate", it does not refer to an allowance which, it contends, should be paid out of the estate subject to the lien of the mortgage. (R. 27). This narrow interpretation of the statutory reference to "Debtor's estate" is erroneous.

The court below rejected that contention, saying (R. 105):

"We may also agree with the appellant's contention that the debtor's estate, within the meaning of Sec.

77(c)(12) of the Bankruptcy Act, includes all of the debtor's property, encumbered and unencumbered, *Continental Ill. Bank & Tr. Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 55 Sup. Ct. 595, 79 L. Ed. 1110, and that the payment of the claim out of property in the hands of appellee as trustee under the refunding mortgage is in fact payment out of the estate of the debtor."

The district court below did not discuss this point. But the District Court for the District of Connecticut has discussed and rejected this contention, specifically holding:

"And certainly the construction advanced by the petitioners [Bankers Trust] is inadmissible. They point to the language of (c)(12) under which the court may order the allowances thereby authorized to be paid 'out of the debtor's estate'. I agree that this language is broad enough to authorize in a proper case payment from the free (unmortgaged) assets of the estate. In this respect, perhaps the Act goes further than the equitable rule whereby allowances for services in behalf of mortgaged property might be charged against the mortgaged assets. But I cannot agree that the scope of (c)(12) is limited to such allowances as may only be charged against the general (unmortgaged) estate. The language used, viz., 'the debtor's estate', is broad enough to include the mortgaged assets as well as the free assets. And if the enforcement provisions of (c)(12) are entitled to this broad construction, as I hold, there is no room left for the argument that the liquidation provisions of (c)(12) with the accompanying grant of jurisdiction to the Commission must by a narrower process of construction be confined to services not covered by lien." [Unreported opinion; for full text see Appendix B; *infra* p. 59.]

The statute provides that "The railroad corporation shall be referred to in the proceedings as a 'debtor'". [Subsection (a)]. No definition is provided for the term "debtor's estate". The latter phrase is used six times in the act, in addition to the use in Subsection (c)(12). Five of these uses refer to compensation or expenses:

- (1) "The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow

within such maximum limits as may be approved by the Commission as reasonable." [Subsection (c)(2); italics added.]

- (2) "It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon request therefor . . . The judge may direct that the cost of preparing such information shall be borne by the *debtor's estate*." [Subsection (c)(5); italics added.]

- (3) "The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission as will permit of such segregation and allocation . . .; and thereafter such segregation and allocation may be made at the expense of the *debtor's estate*." [Subsection (c)(10); italics added.]

- (4) "The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report . . . The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the *debtor's estate*." [Subsection (c)(11); italics added.]

- (5) "The plan shall then be submitted by the Commission to the creditors . . . and stockholders . . . The expense of such submission shall be certified by the Commission and shall be borne by the *debtor's estate*." [Subsection (e); italics added.]

The sixth reference to the debtor's estate is contained in a broad direction to abandon property, if abandonment is in the interest of the "debtor's estate":

- (6) "The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings *in the interest of the debtor's estate* and of ultimate reorganization but without unduly or adversely affecting the public interest . . ." [Subsection (o); italics added.]

In addition there is one reference to the word "estate" unmodified by the word "debtor":

"... the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may upon notice and for cause shown enjoin or stay the commencement or continuance of any judicial proceeding to enforce any *lien upon the estate* until after final decree:" [Subsection (j); italics added.]

It is clear from these various uses that the statutory drafters intended that the phrase "Debtor's estate" should be interpreted broadly in its normal sense to mean the totality of assets of the Debtor whether pledged or unpledged, mortgaged or unmortgaged, which are under the jurisdiction of the court in the reorganization proceeding. Certainly no one would deny that the judge has a wide discretion to direct the payment of a reasonable trustee's salary from all the resources under his jurisdiction (usage 1). Similarly no one would challenge the use of all such resources for the cost of preparing lists of security holders (usage 2), or for the cost of making segregation studies (usage 3), or to pay the cost of a special report by the Commission (usage 4), or to pay the cost of conducting a ballot (usage 5). All these are costs of administration with priority over all liens. Knowing this, the statutory drafters deemed it sufficient to direct their payment *out of the Debtor's estate*.

Any such limited construction as that proposed by the Indenture Trustee would be utterly unrealistic. What is actually being reorganized in the Section 77 proceeding, and constitutes the Debtor's estate, is the totality of the assets of the Debtor, its roadbed, equipment, stations, real estate, stocks, bonds, and other property, including all mortgaged property and leaseholds. As Judge Barnes said in the Chicago and Northwestern reorganization, in reply to the contention of indenture trustees that certain cash pro-

ceeds of mortgaged property should be distributed to the bondholders (33 F. Supp. 230, 254.):

"The line of railroad in question was subject to the lien of the mortgage. The proceeds of the sale of a part of said line are subject to the lien of the mortgage. Both the line and the proceeds of the sale of the line are property of the debtor. The property of the debtor, whether line of railroad or money in the hands of the Bankruptcy Trustee is being reorganized."

Whatever amounts may be paid to the Indenture Trustee, whether such payments come from the cash held by them or from any other sources, they will deplete *pro tanto* the amount which would otherwise constitute the reorganized estate. In every practical sense, therefore, any payment to the Indenture Trustee will be from Debtor's estate.

III.

THE SERVICES RENDERED AND EXPENSES INCURRED BY THE INDENTURE TRUSTEE AND ITS COUNSEL WERE RENDERED AND INCURRED "IN CONNECTION WITH THE PROCEEDINGS AND PLAN."

The Indenture Trustee's petition for allowances of compensation and expenses alleges that the services rendered and the expenses incurred for which compensation is asked "have not been rendered or incurred 'in connection with the proceedings and plan' " for the reorganization of the debtor but were rendered and incurred as trustee under the indenture in performance of its obligations thereunder for the benefit of the trust estate (R. 26-27). This allegation is contradicted by the description of the services as set forth in the petition and affidavits further discussed hereunder. The district court *made no finding* as to whether the services rendered and expenses incurred were or were not in connection with the reorganization proceedings and plan. However, the Circuit Court of Appeals in its opin-

ion held that the services were "in a literal sense" incurred in connection with the proceedings and plan but stated that this fact was not controlling. It said (R. 106):

"Nor is the fact that the service of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. The officers of appellee and its counsel gave attention to the steps taken in the proceedings and attended hearings before the court and the Commission. They took part in conferences in regard to the status of the proposed plan of reorganization and in meetings held to work out new plans." (R. 106.)

Clearly, Section 77(c)(12) demands that services and expenses which come within its purview must be "incurred in connection with the proceedings and plan." It is equally clear that the services here under discussion (except for a certain limitation in period discussed below) were rendered in connection with the proceedings and plan.

The petition for allowance states that petitioner and its counsel actively participated in the proceedings and efforts to reorganize the debtor, (R., p. 18) viz.:

"That during the period referred to in the preceding paragraph, the responsibility of the Corporate Trustee to protect the mortgaged security entrusted to it and the rights of the holders of the Bonds secured thereby has required constant diligence on its part in following the proceedings herein, the proceedings had before the Interstate Commerce Commission in connection with this Reorganization and otherwise;"

The petition further shows that the Indenture Trustee intervened in the proceedings before the district court (R. 24) and in the proceedings before the Interstate Commerce Commission where the plans of reorganization were first considered (R. 25), attended the hearings before the Interstate Commerce Commission, studied and reviewed the vari-

ous plans and briefs before the Commission, considered a plan of reorganization proposed by a holder of Fort Scott bonds and conferred with him in regard thereto (R. 25).

It appears that the Indenture Trustee gave special attention to the following items, among others, arising in the course of the proceedings:

1. The proposal of the Debtor's Trustees to issue Trustees' certificates (R. 19);
2. The annual budgets of Debtor's Trustees (R. 19-20);
3. The equipment of Debtor and purchases and retirement of same (R. 20);
4. The abandonment of various branch lines and salvage (R. 20-21);
5. The printed record of this proceeding (R. 22);
6. Various petitions of Debtor's Trustees (R. 21-22).

It will be found in the record that most of the foregoing recitals state that they related to things done or to be done "pursuant to orders in these proceedings" (R. 20-23, inclusive).

The items of expense sought to be recovered by the Indenture Trustee consist mainly of fees paid to its attorneys. The affidavits concerning the services rendered by its New York and St. Louis counsel, both attached to Petition No. 266 (R. 35 and 60), indicate services of a character similar to that of the trustee. Naturally they cover the same activities. The connection of counsel's services with the proceedings and plan are shown particularly by the following extracts from the affidavits:

"September (1933). . . . Telephone conference with Mr. Swaine, of Cravath, de Gersdorff, Swaine & Wood, in regard to the status of the pending plan of reorganization, the appointment of Trustees in bankruptcy, a conference to work out a new plan and other related matters" (R. 39).

"December (1933). Consideration of transcript of proceedings at Washington and conference concerning reorganization plans of the Debtor" (R. 41).

"July (1934). * * * Correspondence with Corporate Trustee and consideration of order of Interstate Commerce Commission for determination of question whether the Debtor is insolvent" (R. 44).

"March (1935). * * * Consideration of petition and order for examination by Debtor's Trustees of former directors and bankers for the Debtor" (R. 45).

"September (1935). Consideration of report and order of Interstate Commerce Commission relating to the application of the Central Hanover Bank for services in the foreclosure proceedings which preceded the proceedings in Section 77 and letter to the Corporate Trustee thereon" (R. 46).

"November (1936). * * * Further office conference on hearing on December 1 [I. C. C. hearing Dec. 1, 1936], on that Petition [Bankers Trust Company's petition to intervene before I. C. C.], and on the plan of reorganization expected to be submitted" (R. 48).

"December (1936). * * * Attending hearing before the Interstate Commerce Commission on the plan of reorganization" (R. 49).

"April (1937). * * * Correspondence regarding extension of time for Debtor to file a plan of reorganization" (R. 50).

"November (1937). * * * Examined proposed Plan of Reorganization for the Debtor. Conferences with the Corporate Trustee in reference to proposed expenditures of the Debtor for 1938 and certain points in the Plan of Reorganization" (R. 51).

"October (1938). * * * Conferences with the Corporate Trustee in regard to the proposed Plan of the three Committees and the question of lien on equipment. Examined Plan of Reorganization proposed by the three Bondholders Committee. Conference with the Corporate Trustee considering that Plan. Further study of that Plan. Office conference and conference with the Corporate Trustee re approaching I. C. C. hearing. * * *" (R. 54).

"January (1934). . . . Legal research and correspondence with White & Case regarding authority to issue trustee's certificates . . ." (R. 67).

"October (1934). Attendance at hearing before Special Master on proposed investigation as to solvency or insolvency of Debtor; . . ." (R. 72).

"June (1936). Correspondence with counsel for Debtor and with White & Case with reference to application for extension of time for filing plan of reorganization; Consideration of answer of Railroad Credit Corporation to petition for extension of time for filing plan of reorganization; Attendance at Federal Court;" (R. 75).

Thus it is clear from the allegations and statements of the petition and affidavits set out above and from others in the record that the Indenture Trustee and its attorneys have been active in the reorganization proceedings. The very nature of the services demonstrates that they were rendered "in connection with the proceedings and the plan."

To be sure, Bankers Trust was acting in its capacity as Indenture Trustee. Its endeavors to secure the best possible treatment in connection with the proceedings and the reorganization of the debtor and for the claim of the bondholders were, of course, in the performance of its duties as trustee, but these endeavors were occasioned or necessitated primarily by the proceedings and were rendered as a part of the proceedings to produce a plan. Had there been no proceedings, there would have been no occasion or necessity for the Indenture Trustee to consider any plan of reorganization or any of the other matters relating to the proceedings detailed in their petition.

The fact that the services were rendered as Indenture Trustee with a view also of preserving the mortgage estate does not alter the fact that they were rendered in connection with the proceedings and the plan.

Both in Petition 266 and in Petition 267, compensation is requested for services rendered and expenses incurred, in part, during a period prior to the Section 77 proceedings. We do not maintain that these services were "in connection

with the proceedings and plan". The Interstate Commerce Commission, in passing on Petition No. 267, properly declined to include, in the maximum, services rendered or expenses incurred in proceedings antedating the Section 77 reorganization. The Commission stated:

"The maximum limits of allowances fixed hereinafter for this mortgage trustee and its counsel do not embrace any services rendered or expenses incurred in proceedings antedating the reorganization proceedings under section 77, since, in our opinion, allowances for such services and expenses are within the sole control of the bankruptcy court acting pursuant to section 77." [249 I. C. C. at 220.]

Likewise, routine administrative services seem to be not included within the statutory provision. By routine administrative services we mean those services which occur regularly year after year irrespective of the existence of a reorganization proceeding. The Indenture Trustee calls these "administrative services" and states (R: 30):

"That this Petition does not include certain administrative services for which the Corporate Trustee has been paid by the Debtor's Trustees."

Such payment by bankruptcy trustees during a Section 77 reorganization without reference to the Interstate Commerce Commission for routine administrative service as ordinary operating expenses of the railroad is common practice in many of the Section 77 reorganizations. This seems proper where the amount involved in relation to all the circumstances is consistent with routine services. See *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195; *New York, New Haven & Hartford Railroad Reorganization*, 247 I. C. C. 677, 694-696."

We submit, therefore, that under Section 77 no less than under the corporate reorganization provisions of Chapter X "the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization

¹¹ This distinction was specifically approved by the District Court in *The New Haven Case*. See Appendix B *infra* p. 61.

from whatever source they may be payable". *Woods v. City National Bank & Trust Company*, 312 U. S. 262, 267.

IV.

THE TERMS OF THE INDENTURE CREATE NO RIGHT OR REMEDY BEYOND THE REGULATORY POWER CONFERRED ON THE COMMISSION BY CONGRESS.

The Indenture Trustee in the courts below relied heavily upon two provisions of the Indenture to establish its exemption from the Commission's regulatory power. The first of these is contained in Article Twenty-third of the Indenture which reads as follows (R. 17):

"The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

The other of these provisions, in Article Seventeenth, states that in case of sale under power of sale or on a judicial sale, the purchase money, proceeds or awards shall be applied as follows (R. 17):

"1. to the payment of the costs, expenses, fees and other charges of such sale, and a reasonable compensation to the Trustees, their agents and attorneys, and to the payment of all expenses and liabilities incurred and advances or disbursements made by the Trustees, and to the payment of all taxes, assessments or liens prior to the lien of this indenture, except any taxes, assessments or other superior liens subject to which such sale shall have been made."

These provisions, according to the contentions of the Indenture Trustee, had the following legal effects: (1) they created a contract claim and lien; (2) that claim and lien the Indenture Trustee is entitled to have enforced under laws in force in 1901 when the Indenture was executed; (3) the Indenture Trustee is entitled to compensation and expenses irrespective of whether the services rendered were directly and materially beneficial to the estate as a whole

and contributed to the accomplishment of a reorganization; and finally (4) the Indenture Trustee is entitled to a review by a court with power to raise as well as lower the limit fixed by the Commission.

Before considering the soundness of all of the asserted consequences of the alleged right, it will be illuminating to examine the right itself: for if the right should prove to be materially different from that claimed, it is clear that the legal incidents of it must likewise be different.

The provisions of the Indenture, written in 1901, antedated Section 77 by more than thirty years. They were written in contemplation of foreclosure as the effective remedy of enforcement. That was the remedy in common use at that time. Naturally, with the Indenture Trustee as the instrumentality through which that remedy would be enforced it was provided that after the sale the proceeds should be devoted in part to the payment of the Trustee for its services in the foreclosure proceeding.

But there has been no foreclosure or other judicial sale here. The remedy of foreclosure is in fact suspended while the Section 77 proceedings are pending.¹² And, while we do not deny that the Indenture Trustee may properly invoke paragraph (c) (13) of Section 77 and intervene in the proceedings (as it did in fact) it by no means follows that a compensation provision directed to activities in a foreclosure is controlling as to activities in prosecuting a wholly different remedy, namely a reorganization proceeding under Section 77. The distinction between reorganization and foreclosure is more one of substance than mere form. Indeed, various proceedings in the form of bankruptcy may be wholly different in substance, as Mr. Justice Cardozo observed when he said: "A proceeding to reorganize is not a bankruptcy [liquidation], though an amendment to the bankruptcy act creates and regulates the remedy." *Lowden v. Northwestern National Bank*, 298 U. S. 160, 163.

What has happened in fact is that a situation has arisen which was not specifically provided for in the Indenture.

¹² *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648.

A new statutory procedure has been created, and the Indenture fails to provide any measure of compensation in express terms for services performed under the new procedure. In any event a lien for services under the Indenture would be at most inchoate until the services had been performed. Here performance occurred subsequent to the reorganization proceedings and subject to the provisions of and under an intervention permitted by Section 77. The "reasonable" value of that performance was certainly subject to appraisal and liquidation by a fair method under the paramount power of Congress over commerce and bankruptcy. Cf. *Kuchler v. Irving Trust Co.*, 299 U. S. 445; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603.

When Section 77 proceedings were instituted the Indenture Trustee was charged with notice of all of the statutory provisions. It had an unfettered option to resign its trust, as expressly permitted by the Indenture,¹³ or to proceed to participate in the reorganization proceedings. It voluntarily elected to do the latter. May it now brush to one side the conditions of the statute, ignore the legislative mandate that the Commission shall fix the maximum limit on its compensation, and collect more than three times the amount the Commission has found to be reasonable? We submit that it cannot. The decisions of this Court provide a conclusive answer to those who would enjoy the benefits, privileges, and rights conferred by legislation and then seek to set at naught the conditions which the legislature has attached to the enjoyment of those privileges and rights. *United Fuel Gas Company, et al. v. Railroad Commission of Kentucky, et al.*, 278 U. S. 300, 307-308; *Hurley v. Commission of Fisheries of Virginia, et al.*, 257 U. S. 223, 225; and see p. 35, *infra*.

¹³ "Either trustee or any successor may resign and be discharged from the trust created by this indenture by giving written notice thereof to the Railway Company, delivered at or mailed to its last designated office or agency in the City of New York, three months before such resignation shall take effect or such shorter time as may be accepted as adequate, and by the due execution of proper conveyances." (Article Twenty-fifth.)

THE STATUTORY PROCEDURE IS SUBJECT TO NO CONSTITUTIONAL
OBJECTION.

The courts below did not pass on the question whether a maximum limit fixed by the Commission is subject to review by the district court. The District Court for the District of Connecticut has held that the court may disapprove the maximum as unreasonably low and remand to the Commission under the power of the judge to approve the plan only if he is satisfied that the expenses and fees are reasonable and are subject to his approval. See Appendix B, *infra*, p. 59. The question has not been presented in this form to other courts. Other courts have held that they cannot increase a maximum or grant an allowance to a claimant who was denied one by the Commission. These holdings are not in conflict with the ruling of the District Court for Connecticut. *In re Chicago; M., St. P. & P. R. Co.*, 121 F. (2d) 371 (C. C. A. 7th). See also, in accord, *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230 (N. D. Ill.); *In re Chicago, G. W. R. Co.*, 29 F. Supp. 149 (N. D. Ill.). Respondent contends that no review of the maximum is provided, and that therefore the procedure is unconstitutional. No court has reached this conclusion, even though accepting the premise.

Our position is that, while the statute is not entirely clear, judicial review of the maximum is permitted; and that whether this be true or not, the provision is plainly constitutional.

1. The following procedure is provided in Section 77 for determining the appropriate compensation for services and expenses incurred in connection with the proceedings and plan. Parties desiring reimbursement file with the court, frequently at the court's direction, petitions setting forth the services and expenses for which reimbursement is desired and usually stating the parties' views of the appropriate amount. The court clerk forwards a copy of the petition to the Interstate Commerce Commission. The

Commission must hold a hearing and then render a decision fixing maximum allowances deemed appropriate for the services and expenses:

"The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c)." [Section 77(c)(12).]

Ordinarily after the Commission makes its decision, parties to the proceeding have the right to move for reconsideration, rehearing, or other relief. (Section 16(a) of the Interstate Commerce Act and Rule XV of the Rules of Practice before the Interstate Commerce Commission). This right has been used with some success by a number of parties in various proceedings. *New York, New Haven and Hartford Railroad Company Reorganization*, 217 I. C. C. 177; *St. Louis Southwestern Railway Company Reorganization*, 212 I. C. C. 471; *Missouri Pacific Railroad Company Reorganization*, 228 I. C. C. 187; 228 I. C. C. 570; *Denver & Rio Grande Western Railroad Company Reorganization*, 242 I. C. C. 721.

The report and order of the Commission with any modifications thereto which may have been made, and the full record including all testimony, orders, affidavits, exhibits, and other documents, are then forwarded to the bankruptcy court and

"Within such maximum limits as are fixed by the Commission, the judge may make an allowance to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorneys' fees) incurred in connection with the proceedings and plan" [Section 77(c)(12)].

Thus the court's power to make allowances is limited by the Commission's findings of maximum limits. The court cannot allow more than the Commission's maximum. However, the court need not make an allowance to a party

simply because the Commission has set such allowance as a maximum; it can make a lower allowance, or can decide to make no allowance. For example, the court might find that the claimant had violated his fiduciary duties and was not entitled to any fee. *Wood v. City National Bank & Trust Co.*, 312 U.S. 262 (1941). Such partial or complete change of the result of the Commission's order would not require any reconsideration by the Commission, but would be completely within the court's power.

In addition, Congress provided a procedure by which the court must consider ~~all orders~~ granting allowances not merely when such orders are entered but also at the time the plan is approved. The statute specifically requires that when the judge approves a plan he must make findings that all fees and expenses are "reasonable" as well as within the maximum fixed by the Commission.

"the judge shall approve the plan if satisfied that . . . (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, *are reasonable*, are within such maximum limits as fixed by the Commission; and are within such maximum limits to be subject to the approval of the judge." [Section 77(e); italics added.]

This provision can be construed to permit the court to consider whether the maximum is unreasonably low, and if so to withhold approval of the plan. If the judge does not approve the plan, he may dismiss the proceedings or refer them back to the Commission.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in

which event, he shall transmit to the Commission a copy of any evidence received." [Section 77(e).]

If the suggested construction is sound, it should follow that the judge may refer back to the Commission, in advance of his final opinion on the plan, any opinion and order of the Commission setting a maximum for fees or expenses which in the judge's view would make it impossible for him under the Act to approve the plan. This has been done in *In the Matter of The New York, New Haven & Hartford* [Unreported opinion dated June 3, 1942.] though not in advance of the opinion on the plan. This course would conform to the conception of court and administrative agency as "brigaded" tribunals collaborating to a common end through "coordinated action." *United States v. Morgan*, 307 U. S. 183, 190; *Palmer v. Massachusetts*, 308 U. S. 79, 87; *Warren v. Palmer*, 310 U. S. 132, 138.

Should the Court thus refer back to the Commission an order setting a maximum, and the Commission, in due course, forward a second opinion and order which the Court again finds would make approval of the plan impossible, a second reference back could be made. This procedure involves no constitutional problem concerning the judicial function in relation to judicial finality. *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156. The problem is rather a practical one. Conceivably a stalemate might arise between Commission and court. Some help may be afforded by an appeal to the circuit court of appeals from an order fixing allowances within the maximum, or disapproving the plan for inadequate allowances. The appellate court could revise the maximum downward or direct that the case be remanded to the Commission with an opinion setting forth its reasons why the Commission should consider an upward revision.

This system of judicial review is admittedly cumbersome, and a construction of the statute which denied to the courts power to review a maximum would avoid some of the ob-

stacles. It is to be observed, however, that similar difficulties are inherent in the system of review of the plan of reorganization as a whole. The Act gives the district court power to approve or disapprove a plan, but not to draft a new plan. Consequently there is an even greater possibility of cumbrous proceedings than in the case of fees, where the court has power admittedly at least to make an independent downward revision.

2. In any event, whether or not the statute provides for judicial review of the Commission's maximum, the provision is valid. It is important to observe that even under this view of the statute not all issues relating to the allowance of compensation are foreclosed in the district court. This fact is amply demonstrated by the present litigation. Whether the statute applies to indenture trustees, whether it applies to payment out of mortgaged assets of the debtor, and whether the services in question were performed "in connection with" the reorganization proceedings are all questions which the district court may review within the limits ordinarily observed in passing upon the validity of administrative determinations. At most the immunity from review extends to the amount of the maximum.

In passing on the conclusiveness of such a determination, this Court has weighed numerous considerations, in particular the nature of the claim asserted, the character of the facts in issue, the nature of the tribunal, and the kind of procedure provided. *Dohany v. Rogers*, 281 U. S. 362, 369; Brandeis, J., concurring in *St. Joseph Stock Yards Company v. United States*, 298 U. S. 38, 81. Here there are compelling considerations which support the validity of the statutory procedure. The claim is for attorneys' fees and trustee's compensation for services performed after the statutory procedure was established. The Commission is peculiarly qualified to pass on the maximum allowances, in the light of its intimate acquaintance with the proceedings; its opportunity to judge the extent and value of the services, and their contribution to the proceedings

and the possible duplications involved.¹⁴ Moreover, the Commission is in a position to apply a uniform standard in the light of its experience as the central body administering railroad reorganizations. The procedure is not different in substance from that which obtains when a bankruptcy court is called on to allow compensation which has been fixed by a state court for persons employed in a prior phase of the proceedings. Cf. *Callaghan v. Reconstruction Finance Corporation*, 297 U. S. 464, 467. The allowances are matters which Congress itself could have fixed by an absolute standard, as it has done in Section 48 of the Act with respect to various classes of fees. Cf. *Calhoun v. Massie*, 253 U. S. 170; *Margolin v. United States*, 269 U. S. 93. There is thus no question of delegation of judicial power. *Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, 400.

Similar limitations on judicial review are not uncommon, and have repeatedly been upheld. Familiar instances include determinations of the value of merchandise under the customs laws, *Passavant v. United States*, 148 U. S. 214; certain determinations by the Secretary of the Interior in administering Indian Affairs, *First Moon v. White Tail*, 270 U. S. 243; determination by the Interstate Commerce Commission of deficits of carriers compensable under act of Congress, *Great Northern Railway v. United States*, 277 U. S. 172; determinations of value in state condemnation proceedings, *Crane v. Hahlo*, 258 U. S. 142.

Special reasons exist for the validity of a limitation on judicial review in the circumstances presented here. The claimants are fiduciaries, and their counsel entered upon the services in question after the statute had gone into effect, and can hardly be heard to complain of its procedural

¹⁴ As was said by Judge Evans in *In re Chicago, M., St. P. & P. R. Co.*, 121 F. (2d) 371, 375:

"Moreover, the main services in a railroad reorganization occur in the I. C. C. and not in the District Court. The I. C. C. therefore is in the better position to know which attorneys rendered the more valuable assistance and which rendered services of no value to the debtor."

features.¹⁵ Particularly is this true since under the statute their claims are given the status of administrative expenses and thus are accorded the highest priority. Having availed themselves of the opportunity to perform services for compensation under these terms of the Act, the trustee's counsel cannot now attack its procedural conditions. Cf. *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411-412; *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 32-33.¹⁶ The trustee's claim for its own compensation stands on no better footing than that for attorneys' fees. Under the terms of its indenture, it could have withdrawn as trustee upon the institution of the bankruptcy proceedings, and it could have done so without sacrifice of invested capital.¹⁷ Apart from this, it was entitled under the indenture simply to "reasonable compensation". The trustee's claim is in essence a demand that its compensation be liquidated by one procedure rather than another. But "No one has a vested right in any given mode of procedure" (*Crane v. Hahlo, supra*, at 147).¹⁸ As we have pointed out, the claim might have been liquidated by legislative act. Or it might have been required to be liquidated by arbitration. Cf. *Hardware Dealers' Mutual Fire Insurance Company v. Glidden*, 284 U. S. 151. Certainly it cannot be maintained that the procedure prescribed, equivalent as it is to a judicial hearing, is any less adequate.

¹⁵ While nominally the trustee is the claimant, the greater part of the amount sought is asked as reasonable compensation for attorneys' fees. Although these have been paid by the trustee in the amounts requested, the payments were "made subject to their being finally determined to be 'reasonable expenses necessarily incurred and actually disbursed' under the Mortgage" (R. 31).

¹⁶ This is not a case where the conditions might impair interests beyond those of the parties themselves, as for example conditions which might limit the exercise of freedom of speech or burden interstate commerce.

¹⁷ See *supra* p. 28.

The cases relied on by respondent to elevate the amount of its claim for compensation and expenses to a constitutional level are manifestly inapplicable. They deal with the regulation of public utility rates, and in their broadest reach they have never been thought to apply to claims for personal services. *Acker v. United States*, 298 U. S. 426.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court for further proceedings in conformity with the statute.

Respectfully submitted,

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APPENDIX A

The provisions of Section 77 (11 U. S. C., Section 205), as amended, pertinent in this case are the following:

Section 205. Reorganization of railroads engaged in interstate commerce. (a) Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property.

Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"):

.

(b) Plan of reorganization, contents; "securities", "stockholders", "creditors", "claims" ~~defined~~; suspension of statutes of limitation.

A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (in-

cluding fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof;

(3) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan or reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been

previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) of this section.

The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) Proceedings after approval of petition.

After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon August 27, 1935) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than \$1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the ap-

pointment of such legal counsel for the trustees as they shall select, with power of removal. *The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable.* The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 25 of this title, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan, and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each

bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) *The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditor and stockholders by publication or otherwise.*

(10) *The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.*

(11) *The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.*

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The circuit court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however,*

That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

(d) Time for filing plan of reorganization; hearings by Commission; certification of approval to court.

The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it

shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Court hearing after approval by Commission; acceptance of plan by creditors and stockholders; confirmation of plan by court; valuation of property.

Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable

treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commis-

sion to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the

President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. *The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate.* The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):*

If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including

the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceedings hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Binding effect of confirmation; discharge of debtor from liabilities; issuance of securities.

● Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed; and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the

decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.

• • • •

(g) Dismissal of proceedings because of undue delay in reorganization.

If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an

order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

(1) Transfer of title between receivers and trustees or to debtor; "Federal court" defined.

If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court, whether before or after August 27, 1935, a petition or answer may be filed under this section at any time thereafter by such debtor, or its creditors as provided in subsection (a) of this section, and if such petition is approved, the trustee or trustees appointed under this section, or the debtor until such trustee or trustees are appointed, shall be entitled forthwith to possession of and be vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or receivers or prior trustee or trustees and for the payment of such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing such receiver or trustee. Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this

section and for the payment of administrative expenses and allowances in the proceedings hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this title is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska.

- (j) Restraining or staying commencement or continuation of proceedings against debtor; removal of causes; owners' rights to equipment leased or conditionally sold unaffected.

In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceedings to enforce any lien upon the estate until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated. Proceedings under this section prior to its amendment by Act of August 27, 1935, or under this section as amended by such Act, shall not be grounds for the removal of any cause of action to the United States District Court which was not removable before March 3, 1933 and any order removing any cause of action or enjoining the prosecution of any such cause of action in any court is null and void and any cause of action heretofore removed from a State court on account of this section prior to its amendment by Act of August 27, 1935, shall be remanded to the court from which it was removed. The title of any owner, whether as trustee or other-

wise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

(1) Jurisdiction of court, duties of debtor and rights of creditors same as in voluntary bankruptcy.

In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

(c) Abandonment or sale of lines or property.

The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings *in the interest of the debtor's estate* and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by chapter of Title 49, as amended February 28, 1920, or as it may hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment

or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. *The expense of such sale shall be borne in such manner as the judge may determine to be equitable.* The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

(p) Solicitation of proxies or authorizations.

It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in any such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor

to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, *and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services)* upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, *the Commission after hearing by order authorizes such solicitation, use, employment, or action.* *Provided, however,* That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed *are reasonable, fair and in the public interest,* and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respect-

ing such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken; or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to August 27, 1935, in connection with proceedings under this section as in force prior to such date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority

to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided, That with respect to committees which are not subject to this subsection (p), the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor or stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses.*

(q) Application of law granting powers to the Commission.

The provisions of section 12 of Title 49 shall be applicable to enable the Commission to perform its duties under this section and the provisions of such section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

July 1, 1898, ch. 541, §77, as added Mar. 3, 1933, ch. 204, § 1, 47 Stat. 1474, and amended Aug. 27, 1935, ch. 774, 49 Stat. 911; June 26, 1936, ch. 833, 49 Stat. 1969; Aug. 11, 1939, ch. 689, 53 Stat. 1406; boldface captions taken from U. S. Code, not in Statutes at Large, italics added except in phrases "Provided", "Provided, however", "Provided further".

APPENDIX B.

In the District Court of the United States for the District
of Connecticut.

No. 16562.

In Proceedings for the Reorganization of a Railroad.

In the Matter of the New York, New Haven and Hartford
Railroad Company, Debtor.

Memorandum of Decision on Motions to Dismiss Petitions
for Orders 492 and 611.

These petitions are brought each by an indenture trustee, No. 492 by Bankers Trust Company as trustee under the First and Refunding Mortgage and No. 611 by Irving Trust Company as trustee under a Collateral Trust Indenture, asking the Court without reference to or restriction by any maximum allowances set by the Interstate Commerce Commission in these proceedings to adjudicate the amounts on account of the services and expenses of the respective petitioners and their counsel in these proceedings; to decree that the allowances thus established constitute under the provisions of the respective indentures prior liens in favor of the petitioners upon the respective mortgaged properties, or upon securities to be issued to the bondholders secured thereby; and to enforce said liens.

The matter is before the Court upon motions to dismiss these petitions filed and pressed by the Interstate Commerce Commission through its counsel, by the New Haven Trustees, and by Reconstruction Finance Corp., a collateral noteholder in these proceedings. The petitions have also been opposed by brief in behalf of the Mutual Savings Bank Group.

I.

I hold that the services rendered and expenses incurred by the petitioners and their attorneys are covered by the liens of the respective mortgage indentures in so far as

said services were reasonably necessary and adapted (a) to protect and advance in these proceedings the interests of the underlying bondholders, (b) to advance the achievement of reorganization, and (c) to protect the mortgage trustee from personal liabilities for which under the mortgage it has a right of indemnity against the debtor's estate.

I cannot accept the view that the petitioners were acting as mere volunteers in the premises. They were acting at least in substantial part under the contract of the trust indenture whereby they were expressly entitled to "reasonable compensation" and to "reimbursement of reasonable expenses, including counsel fees" for all services rendered "in the execution of the trusts hereby created". The indenture was drawn long prior to the enactment of Section 77. It provided that in case of default the petitioner, as also bondholders, might enter upon and operate the mortgaged property for the benefit of all bondholders; also that the petitioner might foreclose the mortgage and obtain a receiver.

I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. Certainly this equitable obligation was not precisely to be measured by their possible liability in an action at law for nonfeasance. I find nothing in Section 77 which exonerates mortgage trustees from their equitable obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1939. See 15 U.S.C.A. 77bbb and 77ooo (c).

To be sure, the Bankruptcy Act substitutes statutory remedies for the remedies incident to an equity receivership: to the extent that the new remedies vary from the old the course of activity by a mortgage trustee and much of the incidental—but inescapable—detail requires adapta-

tion to that change. But this change did not extinguish any rights or obligations growing out of the mortgage indenture nor transform the status of the petitioners from that of responsible trustees to that of volunteers. And the activities reasonably required for their own protection and for the protection of their bondholders under the exigencies of reorganization under Section 77, as indeed also services contributing to the achievement of reorganization, fell within the lien of the mortgage contracts. Cf. *Straus v. Baker, Co.*, 87 Fed. (2nd) 401, at page 408.

I notice that the Commission has made a distinction between "regular and routine services performed in administering the trust, ordinarily covered by an annual maintenance fees" and other "special" services performed in the reorganization proceedings. This distinction seems to me entirely valid. Such routine services cannot constitute allowances in the reorganization proceedings and are not subject to the jurisdiction of the Commission, because they are not "incurred in connection with the proceedings and plan", as specified under subdivision (c) (12). Nevertheless, both the routine services and the services in the reorganization proceedings may be covered by the lien of the mortgage indenture.

II.

I hold that all compensable services and expenses of the petitioners which were incurred in connection with the proceedings and plan fall within the provisions of Section 77 (c) (12).

Just as Section 77 provides a technique of reorganization which does not require the enforcement of mortgage liens, so it contemplates by subdivision (c) (12) a technique for the liquidation and discharge of contractual claims for services which obviates the necessity of the foreclosure of the covering liens. And the fact that the services and expenses of these petitioners happen to be the subject-matter of contract liens no more excludes their allowance from the effect of (c) (12) than the existence of outstanding mortgages op-

orates to immunize the bondholders secured thereby from the other provisions of the Act which contemplate that their claims may be discharged by the substitution of securities of equivalent value under a plan which satisfies the requirements of the Act. The petitioners' contract provided that they should receive reasonable compensation and reimbursement. The same standard of liquidation is prescribed by Section 77. Only the method and the forum for accomplishing the liquidation is changed.

The language of (c) (12) specifies a single method which shall apply to all parties alike. That Congress indeed intended that subdivision (c) (12) should apply to Indenture Trustees who might happen to have a lien, as well as other parties in interest and committees who were without a lien, abundantly appears from the legislative history of the Act. There is thus no occasion for the modification of the inclusive language of (c) (12) by the process of construction.

And certainly the construction advanced by the petitioners is inadmissible. They point to the language of (c) (12) under which the court may order the allowances thereby authorized to be paid "out of the debtor's estate". I agree that this language is broad enough to authorize in a proper case payment from the free (unmortgaged) assets of the estate. In this respect, perhaps the Act goes further than the equitable rule whereby allowances for services in behalf of mortgaged property might be charged against the mortgaged assets. But I cannot agree that the scope of (c) (12) is limited to such allowances as may only be charged against the general (unmortgaged) estate. The language used, viz, "the debtor's estate", is broad enough to include the mortgaged assets as well as the free assets. And if the *enforcement* provisions of (c) (12) are entitled to this broad construction, as I hold, there is no room left for the argument that the *liquidation* provisions of (c) (12) with the accompanying grant of jurisdiction to the Commission must by a narrower process of construction be confined to services not covered by lien.

III

Nor is the Act, thus construed, unconstitutional.

The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648. Cf. *Wright v. Union Central Life Ins. Co.*, 311 U. S. 273, at 279.

The petitioners further complain that under the Act, as I have construed it, they are deprived of all right to judicial review of a decision by the Commission which seems to liquidate, at least in one dimension, their contractual right to compensation. This complaint is unfounded.

For under subdivision (e) (2) the Judge may approve a plan only if "satisfied" that all allowances "for expenses and fees incident to the reorganization . . . are within such maximum limits as are fixed by the Commission" and are "reasonable". Thus the petitioners' liens can be extinguished through a discharge of their claims in these proceedings only if the maxima set by the Commission are such that the allowances made thereunder by the Judge are found by the Judge to be reasonable.

And if the Judge shall not be satisfied that such maxima permit of allowances which are reasonable, under the Act the Judge may return the petition for reconsideration by the Commission. Such is the view of the parties opposing petitions 492 and 611, including counsel for the Commission. The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as "reasonable" although convinced that it was inadequate. Such a law would stultify both author and agent. Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible creditor and class participation in reorganizations. This policy, in a sense, is paramount to

the policy of economy in administration; were it otherwise the Act would have prohibited all allowance of compensation to the parties from the estate. But plainly Congress did not want costless reorganizations rather than just reorganizations. It follows that the true policy relating to economy is one adapted to preclude excessive expense,—not to enforce inadequate compensation. Thus understood, the policy collides not at all with that of encouraging useful and responsible creditor representation by the allowance of adequate compensation through which that objective can be achieved.

This view is also completely in harmony with the underlying scheme of the Act. For the Act charges the Commission with the responsibility of determining values and of formulating plans. Yet the plans thus reported can be approved by the Judge only if he is satisfied that they are fair; if not thus satisfied, unless he dismisses the proceedings, he can only return the plan to the Commission for further consideration. And so as to a maximum allowance set by the Commission. The Judge can approve the plan only if satisfied that all allowances are within the maxima set by the Commission *and are reasonable*; failing that, he can only dismiss the proceedings or "refer the proceedings back to the Commission for further action" (subdivision (e), second paragraph). Surely under this provision if the Judge's disapproval were limited to the maxima set by the Commission upon specified petitions for allowances, he need not refer back the substantial provisions of a reported plan: a re-reference of those specified petitions would suffice, accompanied by his "opinion stating his conclusions and the reasons therefor."

To be sure, this seems a cumbersome procedure for the liquidation of an allowance. Indeed, theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization. Yet from a practical standpoint, as Congress apparently perceived, in almost every case in which

reorganization is indeed feasible a considered exchange of views between the Commission and the Judge will result in a final agreement purged of inadvertence and extravagance which shall permit of a fair appraisal of services under the particular eye of the Commission and services relating principally to activities before the Judge. Anyhow, Congress deemed it wise to condition the privilege of reorganization upon such an agreement. And if ever a case shall arise resulting in a final deadlock instead of agreement, perhaps the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission. However that may be, the petitioners here cannot justly complain that their rights have been insulated from judicial review when judicial sanction is required for the liquidation and discharge of their claims in the bankruptcy proceedings and in the event that the bankruptcy proceedings are dismissed their claims and covering liens are left unimpaired for adjudication elsewhere.

Thus any question as to the validity of an exclusive grant of jurisdiction to the Commission to fix, or even limit, allowances is not involved under the Act. And there is no basis for the constitutional objection which the petitioners invoke.

On these conclusions, the motions to dismiss petitions 492 and 611 must be granted. For these petitions are neither appropriate nor necessary to raise in issue in these proceedings the reasonableness of the maxima allowed by the Commission. That issue was available to the petitioners at the hearing in this court upon their applications for allowances after the Commission had set maxima under Section 77 (c) (12). On that record without any further expansion, it lay within the power of this Court in these proceedings either to order allowances within the limits of the maxima or to return the applications to the Commission for further action on the ground that the maxima did not permit of adequate compensation.

Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the liens are suspended during these proceedings: they may be enforced only if these proceedings are dismissed.

An appropriate order may be submitted.

Dated at New Haven this 3rd day of June, 1942.

C. C. HINCKS,
United States District Judge.

APPENDIX C.

In the District Court of the United States for the
Southern District of Iowa, Central Division

No. 9434—Bkptcy

IN THE MATTER OF THE FORT DODGE, DES MOINES &
SOUTHERN RAILROAD COMPANY, DEBTOR

Order

This matter coming on for hearing on a Special Appearance of The New York Trust Company, as Trustee, challenging the jurisdiction of this court to refer certain questions regarding fees and expenses to the Interstate Commerce Commission. The Interstate Commerce Commission appears and resists the application. Due notice has been given to all parties in interest, and the matter set down for hearing on this date in open court at Des Moines, Iowa. The Interstate Commerce Commission appears by counsel but the New York Trust Company, as Trustee, does not appear by counsel, and the matter being informally discussed and being advised, the Court finds that the Special Appearance referred to should be and the same is overruled and denied.

It is further Ordered that the prior proceedings in this court in referring claims to the Interstate Commerce Commission for action thereon and including all claims for fees and expenses by or against the New York Trust Company, as Trustee, is confirmed and approved.

The New York Trust Company, as Trustee, excepts.

Signed at Des Moines, Iowa, this 9th day of September, 1941.

(Sd.) CHAS. A. DEWEY,
Judge, U. S. District Court.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 387-388.

RECONSTRUCTION FINANCE CORPORATION,

Petitioner,

v.

BANKERS TRUST COMPANY,

Trustee.

**BRIEF OF RESPONDENT, BANKERS TRUST COMPANY,
IN OPPOSITION TO PETITION OF RECONSTRUCTION
FINANCE CORPORATION FOR WRITS OF CERTIORARI**

✓ JERSE E. WAID,
14 Wall Street,
New York, N. Y.

WHITE & CASE,
Attorneys for Bankers Trust Com-
pany, as Corporate Trustee
under the Refunding Mortgage,
dated August 23, 1901 of The
Kansas City, Fort Scott & Mem-
phis Railway Company.

FITZHUGH MCGREW,
HERBERT F. JULY,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

v.

Nos. 387-388

BANKERS TRUST COMPANY,
Trustee.

**BRIEF OF RESPONDENT, BANKERS TRUST COMPANY,
IN OPPOSITION TO PETITION OF RECONSTRUCTION
FINANCE CORPORATION FOR WRITS OF CERTIORARI**

Statement

1. Bankers Trust Company is Corporate Trustee (hereinafter called the "Corporate Trustee") under the Refunding Mortgage, dated August 23, 1901 (hereinafter called the "Mortgage"), of the Kansas City, Fort Scott & Memphis Railway Company, which as part of the St. Louis-San Francisco Railway Company system is in reorganization proceedings under Section 77 of the Bankruptcy Act, as amended, in the District Court of the United States for the Eastern District of Missouri.

2. On or about December 30, 1940, the District Court, by Order No. 242, directed that all petitions for compensation for services rendered or for expenses (including reasonable attorney's fees) to January 31, 1941, incurred either under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act, or incurred otherwise than under that

clause, should be filed with that Court on or before February 15, 1941.

3. Paragraph two of Article Twenty-third of the Mortgage makes express provision for the compensation and expenses of the Trustees in the execution of the trusts created by the Mortgage as follows:

"The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

4. The Corporate Trustee now holds cash deposited with it subject to the terms of the Mortgage in the amount of \$72,020.55, of which \$29,402.58 represent accumulated proceeds of properties released from the lien of the Mortgage, and \$42,617.97 represent accumulated income received upon the collateral held subject to the terms of the Mortgage.

5. The Corporate Trustee rendered services in the execution of the trusts created by the Mortgage, which are set forth in detail in Petition No. 266 described in paragraph 7 below, for which it asked the sum of \$10,000 as reasonable compensation, together with the sum of \$767.88 for expenses incurred and actually disbursed.

6. The Corporate Trustee employed as legal counsel Messrs. White & Case, of New York City, and Messrs. Bryan, Williams, Cave & McPheeters, of St. Louis, Missouri, to advise it with respect to the performance of its duties under the Mortgage. For their legal services said firm of White & Case and said firm of Bryan, Williams, Cave & McPheeters rendered to the Corporate Trustee their bills in the respective amounts of \$10,000 and \$6,000 together with disbursements of \$24.28, which the Corporate Trustee

paid, pursuant to its powers under, and in accordance with the provisions of, the aforesaid Article Twenty-third of the Mortgage; such payments, however, having been made subject to their being finally determined by the District Court to be "reasonable expenses necessarily incurred and actually disbursed" under the Mortgage.

7. Thereafter and on or about February 15, 1941, the Corporate Trustee filed its petition (together with affidavits attached thereto) here involved (hereinafter called "Petition No. 266", Rec. p. 14), which set forth its services and expenses and those of its counsel above named, in the performance of the trusts under the Mortgage. In that Petition the Corporate Trustee prayed, among other things, that the District Court adjudicate that Section 77 (c) (12), quoted below, is not applicable to the Corporate Trustee, or if so applicable, that it is unconstitutional and void, and that the District Court adjudicate that there is due the Corporate Trustee the sums set forth in that Petition as its compensation and expenses (including the compensation and expenses paid by it to its counsel as aforesaid), for which it has a lien or charge under Article Twenty-third of the Mortgage.

8. In order, however, to protect the Corporate Trustee's rights and remedies in the event that it should be determined by the District Court that Section 77 (c) (12) was applicable to the Corporate Trustee, and, as so applicable, was constitutional, the Corporate Trustee, on or about February 15, 1941, filed (without prejudice to or waiver of its aforesaid Petition No. 266) a further petition (hereinafter referred to as "Petition No. 267", Rec. p. 83) to meet the provisions of Order No. 242 relating to petitions for compensation for services and expenses rendered and incurred under Section 77 (c) (12).

9. On June 30, 1941 the District Court entered its Order on Petition No. 266 (Rec. p. 87). Such order held

that Subsection (c) (12) was not applicable to the claim of the Corporate Trustee for compensation and expenses, allowed that claim in the amounts prayed for in that Petition and held that those amounts were a charge on the mortgage estate and upon the cash deposited under the Mortgage.

10. Upon appeal by Reconstruction Finance Corporation to the Circuit Court of Appeals, Eighth Circuit, that Court, on June 10, 1942, affirmed the judgment of the District Court (reported in 129 Fed. (2d) 122). The Petition for Writs of Certiorari, now before this Court, followed.

Statute Involved

Subsection (c) (12) of Section 77 of the Bankruptcy Act reads as follows:

"(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pay-

suant to the provisions of paragraph (12) of this subsection c and, after hearing, if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection c."

The Issue Involved

Whether the District Court has exclusive jurisdiction and sole power to determine and adjudicate the reasonable value of the services and expenses of the Corporate Trustee and of its attorneys and the amount and extent of its claim and lien therefor, or whether the Commission has exclusive jurisdiction under Subsection (c) (12) of Section 77 of the Bankruptcy Act to fix the maximum limits of such compensation and expenses. The determination of that issue depends, first, upon whether or not said Section 77 (c) (12) was intended to apply to the situation here presented by the Corporate Trustee, and, second, upon whether or not, if so intended, that statute would be constitutional.

POINT I

Certiorari should be denied since the decision of the Circuit Court of Appeals was correct.

That decision directly upheld the contentions of the Corporate Trustee that it had a contract claim and prior lien upon the mortgaged property for its compensation and expenses and that the Bankruptcy Court had exclusive jurisdiction to allow that claim, without the intervention of the Interstate Commerce Commission under Section 77 (c) (12). The core of its decision is set forth in its opinion (Rec. p. 102) at pages 106 and 107, as follows:

P. 106: " * * * Appellee's claim is based upon its contract, expressed in the refunding mortgage, and is for its services to the trust estate required

by that mortgage in fulfilling its duty and obligation to the bondholders secured by the mortgage.

Under Sec. 77 of the Bankruptcy Act the bankruptcy court acquired exclusive jurisdiction of all of the property of the debtor railroad wherever situated. But it took possession of the debtor's property subject to all valid claims against it. Appellee, as trustee under a mortgage conveying a large part of the debtor's estate as security for the payment of certain bonds of the debtor, intervened in the reorganization proceedings in order to protect the rights of the bondholders. In any plan of reorganization of the debtor finally adopted, these bondholders were entitled to fair and equitable treatment, and appellee was a proper party to represent them in the reorganization proceedings. By the terms of the trust indenture it was entitled to compensation for its services rendered in behalf of the bondholders. As a general rule the trustee is entitled to compensation out of the trust estate for the services rendered and expenses incurred in the protection of the trust. *Perry on Trusts and Trustees*, Vol. II, p. 1531; *Restatement, Law of Trusts*, Vol. I, Secs. 242, 244. *Schoenherr v. Van Meter*, 215 N.Y. 548, 109 N.E. 625; *Halkett v. Moore*, 282 Mass. 380, 185 N.E. 474. In the present case the trust estate was charged with a lien to secure the payment for the trustee's services and expenses properly incurred in the administration of the estate. As the bankruptcy court had possession of the trust estate as a part of the debtor's estate, it was necessary for the appellee to apply to that court for the allowance of its claim."

P. 107: "We think the claim of the appellee was within the jurisdiction of the court below to allow without the intervention of the Interstate Commerce Commission under Sec. 77 (c) (12)."

Although in the argument and briefs the separate issue had been raised as to whether the services in question were rendered "in connection with the proceedings and

plan" within the meaning of Section 77 (c) (12), the Circuit Court of Appeals held that that was not controlling on the question. It said in its opinion (129 Fed. (2d) at p. 125):

"Nor is the fact that the services of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. * * * But appellee was at all times acting primarily in the interest of the bondholders under the refunding mortgage. The fact that the services of appellee on behalf of the trust estate were also beneficial to the reorganization proceedings should add to rather than detract from, its right to compensation."

Futhermore, since the Circuit Court of Appeals held that Subsection (c) (12) and the jurisdiction of the Commission thereunder were not applicable to the Corporate Trustee, it was not necessary for it to pass upon any of the constitutional points which were there raised by the Corporate Trustee and are hereinafter set forth in this brief.

We submit that the foregoing decision is correct and that the decision of the District Court for the District of Connecticut (hereinafter referred to as the New Haven decision), referred to by Petitioner Reconstruction Finance Corporation at pages 9-10 of its Petition for Certiorari, which held that Subsection (c) (12) was applicable to a mortgage trustee with a claim and lien, is erroneous.

There can be no doubt that the Corporate Trustee has a contract claim and prior lien upon the mortgaged property for its reasonable compensation and expenses (including the compensation and expenses of its counsel) for all services rendered by it in the execution of the trusts thereby created. Even the New Haven decision fully upholds the validity and scope of that claim and lien. (See

that opinion at pages 16-18 of Appendix A attached to Petition for Certiorari.)

Passing for the moment the question of whether Subsection (c) (12) could constitutionally do so (considered hereinafter), the question is whether Subsection (c) (12) intended to take away the valuable and established incident of that contract claim and lien—its liquidation by the Court—and confer it upon the Commission. Since, as shown below in Points II-A and II-B, that result would constitute an unconstitutional denial of the right to judicial review and an unconstitutional impairment of vested property rights, we submit that Subsection (c) (12) should not be construed to have brought about that result.

That statute neither requires nor justifies any such conclusion. *Contrary to the conclusion in the New Haven decision (see pages 18-20 of Appendix A of Petition for Certiorari) there is not the slightest suggestion in the language or in the history of that enactment that it was intended to cover the liquidation or enforcement of a contract right and lien conferred by a mortgage for services and expenses of a mortgage trustee in the execution of the trusts created by the mortgage and to transfer the District Court's established and exclusive jurisdiction over the determination of such a right and lien to the Commission.* The amount, extent and priority of all secured claims and liens are intended under Section 77 to be adjudicated solely by the Bankruptcy Court and not by the Commission. Subsection (c) (7) provides expressly that the judge shall determine and fix a time within which claims of creditors may be filed and "the manner in which such claims may be filed or evidenced and allowed," and further provides for the division by the judge of creditors and stockholders "into classes according to the nature of their respective claims and interests." A mortgage trustee's secured claim and lien is just like any other lien and no different treatment is provided for it.

Furthermore, Subsection (c) (12) is in terms applicable only to an "allowance to be paid out of the debtor's estate." The Corporate Trustee is not applying here for an "allowance" out of the Debtor's estate under Subsection (c) (12); and its rights do not arise by reason of Section 77 (c) (12), but wholly independently thereof: It is seeking to enforce a contract right and a lien therefor conferred upon it both by the Mortgage and by the common law in 1901, when the Mortgage was executed, thirty-two years prior to the enactment of Section 77 itself.

The courts have several times recognized the distinction under Section 77B between compensation of a mortgage trustee, which is to be paid out of the mortgaged property pursuant to a contract claim and lien, and allowances which are to be paid out of the general estate.

Thus, in *Straus v. Baker Co.*, 87 Fed. (2d) 401 (C.C.A. 6, 1937), the court clearly distinguished between the right of a mortgage trustee to an allowance from the general estate and his right to compensation under the terms of the mortgage from a fund available for bondholders, stating, at page 408:

"The trustee Straus makes claim in the dual capacity of trustee for the bondholders under the mortgage, and as reorganization trustee. If, as the court found, he was active in the matter of the National Hotel cash plan, and those activities were in the interest of the bondholders, and contrary to the interest of the estate as a whole, the court correctly denied him compensation as reorganization trustee. But as trustee for the bondholders he was in any event entitled under the mortgage contract, to an allowance out of the fund."

The same distinction has been recognized in the case of *In re Buildings Development Co.*, 98 Fed. (2d) 841, 843-844 (C.C.A. 7, 1938), in which it was held that if a mortgage trustee does not "claim any priority . . . by reason of the lien provision in the trust indenture", and seeks only

an allowance from the general estate, the burden is upon such trustee to show the value of its services "to the debtor apart from the value to the bondholders".

The inclusion of the phrase "trustees under indentures" in Subsection (c) (12) does not require any other conclusion. It gives compensation to an indenture trustee, who might otherwise receive no compensation, such as a trustee under an unsecured issue or a trustee whose security has no value. But a trustee is not limited to the remedy of an allowance pursuant to Subsection (c) (12) and is not compelled to surrender its contract right to obtain its compensation from the liquidation of its lien by a court. The right conferred by that statute is not exclusive but a new remedy of which a trustee may take advantage if and to the extent that it falls within the requirements of the statute. There is not the slightest suggestion in the statute or in the statements made by members of Congress at the time of its enactment that it was intended to deprive a trustee of its pre-existing contract rights for services performed primarily for the trust estate and the bondholders, or to abrogate the legal incident of those rights, of liquidation by the Bankruptcy Court.

Nor is the fact that Section 77 alters the pre-existing technique for the enforcement of the secured claims of bondholders by means of a plan or reorganization, relied upon by the Court as an analogous situation in the New Haven decision (see pp. 18-19 of Appendix A of Petition for Certiorari), any indication ~~that~~ Section 77 intended to subject the secured claims of mortgage trustees for compensation and expenses to Subsection (c) (12) since the distinctions between the two situations are clear: (1) the bondholders have a lien the amount of which is definitely fixed by the terms of their mortgage contract while the amount of the lien of mortgage trustees has to be determined; (2) the bondholders have been given the additional

protection, under the statute, of a two-thirds vote of their particular class before they can be subjected to the plan, and of a clear-cut and established right of appeal while mortgage trustees with a lien have no such right to vote and no right of appeal.

The Commission has no jurisdiction unless clearly conferred upon it by Section 77. See *In re Chicago & N. W. Ry. Co.*, 121 Fed. (2d) 791 (C.C.A. 7, 1941), in which the court, in referring to Subsection (c) (12), said at page 800:

“ * * * Moreover, the jurisdiction is in the Court, unless taken from it and placed in the I.C.C. by this subsection of the statute.”

The statute has not made that transfer of jurisdiction in respect to mortgage trustees holding liens for their compensation and expenses.

We submit from all of the foregoing that the decision of the Court below was correct in holding that Subsection (c) (12) does not apply to the claim and prior lien of the Corporate Trustee against the mortgage estate for its compensation and expenses; that Subsection (c) (12) has not taken away the exclusive power and duty of the District Court to adjudicate that claim and prior lien, and has not conferred that jurisdiction upon the Commission.

Those conclusions find additional support in the statute itself and in a further decision discussed below.

The statute itself makes express provision for the retention by the District Court of its jurisdiction to award compensation and expenses free of the jurisdiction of the Commission to fix maximum limits, in cases not covered by the statute, and it recognizes that the latter is not the exclusive source of compensation in a railroad reorganization. Thus Subsection (e) (3) of Section 77 provides that:

“ After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: * * * (3) the plan provides for the payment of all costs of administration and all other

allowances made or to be made by the judge, except that allowances provided for in subsection (c) paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same."

In the Report dated December 3, 1940, of William L. West, Esq., Special Master appointed by the Court in the Erie Railroad Company Reorganization in the District Court of the United States for the Northern District of Ohio, to pass on the claim of the Chase National Bank, a secured noteholder, for legal expenses incurred by it in the enforcement and protection of the collateral securing the note, but not in connection with the proceedings and plan, it was argued against the allowance of that claim that the court had no power to determine the Bank's claim for legal expenses without first referring the matter to the Commission for the fixing of a maximum amount under Section 77 (c) (12). The Special Master rejected that contention completely, saying in his report:

"Furthermore, this claim involves the adjudication of a substantive right created by contract, for the Bank's right to have its reasonable expenses, including counsel fees, allowed as part of its secured claim arises by virtue of contract—i.e., the terms and provisions of the Debtor's note—and not by virtue of the provisions of the Bankruptcy Act relating to 'allowances'. Thus, apart from the terms of the Debtor's note, the Bank would not be entitled in this proceeding to the allowance of its claim for expenses.

Under the circumstances, this claim is not compensable as an 'allowance' under the Bankruptcy Act so as to require action by the Commission with regard to the fixing of a maximum amount."

It should be noted that in *Matter of the Fort Dodge, Des Moines & Southern Railroad Co.*, referred to at page 10 of the Petition for Certiorari, the amount involved was

so inconsequential in comparison with necessary traveling expenses, that counsel for the mortgage trustee, The New York Trust Company, did not appear and argue the case or file a brief.

Furthermore, as shown hereinafter under points II A, B and C, if Section 77 (c) (12) is held to be applicable to the Corporate Trustee having a claim secured by a lien, it would render that subsection of the statute invalid as an unconstitutional denial of its right to judicial review and as an unconstitutional impairment of its property rights, all in violation of the Fifth Amendment of the Constitution of the United States, and in violation of Section I of Article III thereof. The Court below was right in construing Section 77 (c) (12) as not applicable to the Corporate Trustee since a contrary construction would render it unconstitutional.

POINT II

Certiorari should be denied since any decision which should hold, contrary to the decision of the lower court, that Section 77 (c) (12) was applicable to the Corporate Trustee would render that statute unconstitutional.

A

Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be an unconstitutional denial of its right to judicial review in violation of the Fifth Amendment of the Constitution of the United States.

If Subsection (c) (12) were held to apply to compensation and expenses of a mortgage trustee with a contract claim and lien therefor against the mortgaged property, it would be an unconstitutional denial of the Corporate Trustee's right to judicial review.

It is our contention that if the maximum limits are to be fixed by the Commission under Subsection (c) (12), we

are constitutionally entitled to a review of such maxima by some court, either the District Court or an Appellate Court, with power to raise those maximum limits. We contend that no such right of review exists.

Although the District Court is given the authority under that statute to make an allowance which may be less than the maximum fixed by the Commission, it is clear from the following authorities that it has no power to pass upon whether the reasonable value of the services exceeds that maximum and may not raise that maximum.

Thus, in *In re Chicago, M., St. P. & P. R. Co.*, 121 Fed. (2d) 371 (C.C.A. 7, 1941), the court, after a study of Section 77 (c) (12) itself and the history of the Congressional Records leading to its passage, said at page 374:

"Our reading of the statute convinces us that Congress contemplated a plan (which it enacted) whereby the I.C.C., not the District Court, should fix the maximum allowances to attorneys, and within that allowance the court was to exercise its judgment.

"* * * The court was ultimately to determine the amount of the fees, but its action was limited by the maximum fixed by the Commission."

In *In re Chicago & N. W. Ry. Co.*, 35 Fed. Supp. 230 (D.C.N.D. Ill., 1940), the court said at page 258:

"But whether the reasonable value of the services exceeds the maximum limits fixed by the Commission is, so far as this court is concerned, an academic question which this court has no power to determine and which it accordingly must decline to examine."

See to the same effect *In re Chicago, G.W.R. Co.*, 29 Fed. Supp. 149 (D.C.N.D. Ill., 1939) at page 162; *Chicago and North Western Railway Co. v. United States of America, et al.* (Civil Action No. 2810 D.C.N.D. Ill., May 29, 1941; not yet reported) portion quoted at p. 20 hereof.

Those decisions leave no doubt that the District Court has no jurisdiction whatsoever over the adequacy of the maximum and cannot take any effective action to have it raised.

The District Court in the New Haven decision held that if it concluded that the maximum was less than reasonable, it could refer it back to the Commission as part of its authority over the plan of reorganization under Subsection (e) (2) of Section 77, and that therefore the Corporate Trustee was not unconstitutionally deprived of its right to judicial review (see pp. 21 and 22 of Appendix A of the Petition for Certiorari). R.F.C. makes the same point in its Petition for Certiorari (see pp. 13-14).

Subsection (e) (2) provides as follows:

“ * * * After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: * * * (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, *are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge;* * * * ” (Italics ours.)

We submit that those conclusions of the District Court are erroneous:

- (1) Plainly they are contrary to the foregoing cases.
- (2) They are contrary to the portion of Subsection (e) (2) above italicized which expressly reaffirms the requirement of Subsection (e) (12) that the allowance be within the maximum fixed by the Commission and expressly confines the District Judge's right of approval to an allowance within that maximum. It is obvious therefrom that the authority of the District Judge under Subsection (e)

(2) to pass upon the reasonableness of the allowances is circumscribed by the maximum over which he has no control, and that he has no authority whatsoever, as part of his jurisdiction over the plan or otherwise, to refer back to the Commission, at any stage of the proceedings, any finding of the Commission on maximum allowances, on the ground that it is too low.

(3) They are contrary to the intent of Congress in enacting Subsection (c) (12), which was to leave no discretion to the Judge at all as to the maximum, and to make the Commission the limiting factor on fees. This is shown clearly by the testimony of the Congressional hearings leading to its passage.

Thus, in the colloquy in which Commissioner Mahaffie of the Commission was testifying as to Section 77 (c) (12) at the hearings in April, 1935, before the House Judiciary Committee on the proposed amendments to Section 77 (quoted by the Court in *In re Chicago, M., St. P. & P. R. Co.*, 121 Fed. (2d) 371 *supra*, at p. 374), it was stated:

“Mr. Celler (Member of the House Judiciary Committee). It is true, though, that the court has very little to do under those circumstances.

Mr. Mahaffie. The court has to fix the actual fee and may have to hold a hearing on it.

Mr. Hancock (Member of the House Judiciary Committee). You anticipate that the maximum fee fixed will be the fee allowed and will also be the minimum fee, do you not? In other words, there will be no discretion left to the judge at all, as a matter of fact?

Mr. Mahaffie. I would not want to say that the court would not use some discretion under the statute. I anticipate that we will be the limiting factor on fees, however, if this proposed law is passed.

Mr. Celler. For practical purposes there would be no discretion left in the court except as to your maximum which would be quite low, I imagine, considering all the facts.

Mr. Mahaffie. I think that is substantially what has happened under section 72 as to the fixing of salaries; yes sir. We have fixed which we called a maximum and I think the courts have almost uniformly paid it."

From which the Circuit Court of Appeals in that case concluded as follows:

"Our reading of the statute convinces us that Congress contemplated a plan (which it enacted) whereby the L.C.C., not the District Court, should fix the maximum allowances to attorneys, and within that allowance the court was to exercise its judgment. . . .

To accomplish the result thus sought, the L.C.C. was empowered (and required) to fix the ceiling, — the maximum of fees and expenses for the various counsel representing the numerous claimants. The court was ultimately to determine the amount of the fees, but its action was limited by the maximum fixed by the Commission."

In the Report of the same hearings, the following occurred at page 85:

"Mr. Burgess (counsel for insurance companies). . . . I am not sure whether that maximum is appealable. Are you, Mr. Craven? That is, can the fixation of a maximum by the Commission be appealed under this act?

Mr. Craven (counsel for Commissioner Eastman in drafting the 1933 Act). I think not.

Mr. Burgess. You think not?

Mr. Craven. That is my recollection of it.

Mr. Celler (Member of the House Judiciary Committee). Even if the court would accept the maximum there would be no appeal from the court's ruling?

Mr. Burgess. I do not know of any appeal that you can take from the Commission's fixation of a maximum under this act.

Mr. Celler. That does not seem right.

Mr. Burgess. That is an appeal from the court's fixation, of course, but that would have to be within the maximum, so I do not know of any appeal.

• • • • •

Mr. Celler. That leaves the entire matter in the hands of the Interstate Commerce Commission, practically speaking.

Mr. Michener. Yes.

Mr. Burgess. Yes.

Mr. Celler. With no right of appeal at all if the maximum is accepted by the court?

Mr. Burgess. That is my understanding. If Mr. Craven had a different view, I should be glad to accept his view.

Mr. Craven. That is my understanding of it."

(4) The conclusions of the District Court in the New Haven decision as to its right of review of maximum allowances fixed by the Commission do not furnish a practical, workable solution and could not have represented the intent of Congress in enacting Subsection (e) (2). As stated by the District Court itself in its opinion "theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization." Congress certainly did not intend, we submit, to set up a procedure for the determination of allowances under which there was even a possibility of such a result. Nor is that possibility so remote. It is quite conceivable that courts with views divergent from the Commission's as to the measure of reasonable compensation might frequently find it impossible to come to an agreement with the Commission on the subject. The District Court finds no way out of such a dilemma except that it says "perhaps the disagreement can be solved by . . . an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission."

As shown above, the Judge has no authority under Subsection (c) (12) to make such an order and as shown below, the authority of the Circuit Court of Appeals under Subsection (c) (12) to pass upon maxima is no greater than that of the District Judge.

The right of appeal to the Circuit Court of Appeals is only from "orders of the Court fixing such allowances." That subsection furnishes no authority whatever for an appeal from the maximum fixed by the Commission, and that authority is not contained anywhere in the statute. On an appeal from the District Court's order, the Circuit Court of Appeals cannot review the reasonableness of that maximum, since the District Court in making the order appealed from cannot pass upon the maximum. As shown by all of the foregoing, both the District Court in making its order and the Circuit Court of Appeals in reviewing it are confined to a determination of reasonableness within the maximum fixed by the Commission.

There is nothing whatever in the statute which authorizes the Circuit Court of Appeals to remand any finding on maximum allowances to the Commission at any stage of the proceedings. Even if that were possible, the Court would be powerless to fix the sum to be awarded and the Corporate Trustee's only remedy would consist of a succession of expensive appeals to the Circuit Court of Appeals from successive inadequate maxima fixed by the Commission.

There is no right of appeal under the Urgent Deficiencies Act from the maximum limits fixed by the Commission. See *Chicago and North Western Railway Company v. United States of America, and Interstate Commerce Commission* (Civil Action No. 2810 D.C.N.D. Ill., May 29, 1941), which arose on an appeal to a statutory three judge court under the Urgent Deficiencies Act, for an injunction setting aside an order of the Commission which refused to make an allowance for the costs of an appeal by the debtor therein.

from the approval of the plan of reorganization. There the court in holding that it did not have jurisdiction of the appeal said in referring to Section 77 (c) (12):

"This section provides a complete scheme for the handling of expenses of reorganization—first, the I.C.C. passes upon the maximum amount which may be devoted to a specific expense, then the district court further checks such allocation, *and is granted power only to diminish the same, and then the aggrieved party may challenge the District Court's determination* by immediate and summary appeal to the Circuit Court of Appeals." (Italics ours.)

Nor is the remedy of mandamus available to determine whether the Commission has made a reasonable allowance since it is axiomatic that mandamus will not lie to control or review the exercise of discretion (in the absence of patent abuse).

In view of all of the foregoing, we submit that the District Court's conclusion in the New Haven decision (see p. 23 of Appendix A to Petition for Certiorari), that the Corporate Trustee's constitutional right to judicial review has been safeguarded, is clearly unsound.

There is a fundamental distinction between the power of the District and Circuit Courts over a plan of reorganization, and their power to review maximum limits of allowances. Under the former the courts are not bound by the plan proposed by the Commission. If one plan or fifty plans submitted by the Commission appear to the courts to be unreasonable, one and all can be rejected by the courts. Under Subsection (c) (12), on the contrary, if the Commission should allow a maximum of \$50 for services which the Court considers to be worth \$10,000, the Court can do nothing to raise the maximum or to compel the Commission to do so.

Since Subsection (c) (12) makes no provision for any judicial review upward from the maximum of the Com-

mission, which is binding and conclusive, it is unconstitutional if held to be applicable to the determination of the contract right and lien of the Corporate Trustee for compensation and expenses.

The Court below was right in construing Section 77 (12) as not applicable to the Corporate Trustee since a contrary construction would render it unconstitutional.

Since a constitutional right of the Corporate Trustee is involved, the statute, if held to be applicable to it, is unconstitutional in not providing for a complete judicial review as to both fact and law. In any event, it is unconstitutional in not permitting revision upwards by judicial review, of the maximum fixed by the Commission.

It is well established that legislation, whether of Congress or of the States, cannot constitutionally make the determination of an administrative body binding and conclusive in a matter involving a constitutional question and take away the right to the independent judgment of a court as to both facts and law in the matter. In the case at bar the constitutional matter involved is the Corporate Trustee's contract right and lien for reasonable compensation and expenses (to be determined according to the recognized standards set forth in Point II, B (b)), and to be protected against an allowance inadequate and unrelated to real value, which would amount to a deprivation of property without due process of law.

In *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U. S. 418 (1890), the court held a state statute unconstitutional which made the rates of charges for transportation fixed by a railroad commission conclusive and denied a judicial inquiry as to the reasonableness of those rates, saying at pages 457, 458:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judi-

cially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

* * * *

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the constitution of the United States * * *."

In *U. S. v. New River Collieries*, 262 U. S. 341 (1923), the Court said at pages 343-344:

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

In the leading case of *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287 (1920), an order of a commission fixing maximum rates for a water company was held unconstitutional on the ground that it violated due process of law as depriving the water company of judicial review.

See also to the same effect:

Crowell v. Benson, 285 U. S. 22 (1932) (which arose under a Federal statute), at p. 60;

Bluefield Co. v. Public Service Commission, 262 U. S. 679 (1923);

Central-Kentucky Natural Gas Co. v. City of Mt. Sterling, 32 Fed. (2d) 338 (D.C. E.D. Ky., 1928), at p. 341;

Western Distributing Co. v. Public Service Commission, 58 Fed. (2d) 239 (D.C.D. Kansas, 1931) at p. 241;

Denver Union Stock Yard Co. v. United States, 57 Fed. (2d) 735 (D.C.D. Colo., 1932) at p. 739.

Furthermore, it is well settled that a statute under which an administrative body acts must always provide for a right of judicial review to determine whether the decision of the administrative body was contrary to law or to the evidence or without evidence to support it.

See:

Denver Union Stock Yard Co. v. United States, 57 Fed. (2d) 735 (D.C.D. Colo., 1932);

Tagg Bros. v. United States, 280 U. S. 420 (1930), at p. 444.

B

Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be an unconstitutional impairment of its property rights in violation of the Fifth Amendment of the Constitution of the United States.

If Subsection (c) (12) were held to apply to compensation and expenses of a mortgage trustee with a contract claim and lien therefor against the mortgaged property, it would be an unconstitutional impairment of the Corporate Trustee's property rights.

(a) Congress has no power under its bankruptcy powers to impair vested property rights.

As shown under Point I *supra*, the Corporate Trustee has a contract right to reasonable compensation and expenses and has a prior lien or charge therefor upon the mortgaged property, which became vested long prior to the enactment of Section 77 (c) (12), both under the Mortgage and under the common law. It is our contention that the Corporate Trustee has the right to have the amount, validity and priority of that contract right and lien determined exclusively by the Bankruptcy Court and charged by it against the mortgaged property, including the cash deposited under the Mortgage, and that if Congress has attempted to substitute therefor the right to have the Commission determine the maximum amount of that right and lien under Section 77 (c) (12); that statute if applied to the Corporate Trustee is an unconstitutional impairment of its vested property rights in violation of the Fifth Amendment to the Constitution.

It is well settled that the bankruptcy power of Congress is subject to the Fifth Amendment and that, accordingly, Congress does not have the power to impair vested rights or liens by bankruptcy legislation.

See:

Louisville Bank v. Radford, 295 U. S. 555 (1935)
at pp. 589, 594, 601-602;

Continental Bank v. Rock Island Ry., 294 U. S. 648
(1935) at pp. 676-677, 681.

In *Security-First National Bank v. Rindge Land & Navigation Co.*, 85 Fed. (2d) 557 (C.C.A. 9, 1936), the court said at page 561:

"The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with

the Fifth and Fourteenth Amendments to the Constitution. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594."

See to the same effect:

In re American Motor Products Corporation, 98 Fed. (2d) 774 (C.C.A. 2, 1938) at p. 775;

In re Utilities Power & Light Corporation, 91 Fed. (2d) 598 (C.C.A. 7, 1937) at pp. 600-601; cert. denied 302 U. S. 742;

Guaranty Trust Co. v. Henwood, 86 Fed. (2d) 347 (C.C.A. 8, 1936) at p. 352; cert. denied 300 U. S. 661.

(b) Section 77(c) (12), if applicable to the Corporate Trustee, would not be a mere suspension of or change in its remedy, but would be an impairment of its substantive right to a lien.

The District Court in the New Haven decision said in its opinion (see pp. 20 and 24 of Appendix A to Petition for Certiorari):

"The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution."

"Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the liens are suspended during these proceedings; they may be enforced only if these proceedings are dismissed."

We submit that those conclusions are erroneous. This is not a case of a mere suspension of a remedy, but of an impairment of a substantive right. The distinction between the two is perfectly clear.

The test in the analogous question as to whether a particular state statute has impaired the obligation of contracts in violation of Article I, Section 10, of the Constitution is stated in *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437 (1903), as follows at page 439:

"But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, *provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.*" (Italics ours).

And in *Willoughby on the Constitution of the United States*, 2nd Ed., Vol. 2, it is stated as follows at page 1223:

"It is apparent, then, that it lies within the province of the court in each individual case to determine whether the legislative alteration of a remedial right with reference to a contract earlier entered into is of such a drastic character as to cause it to diminish the substantive rights under that contract, and thus, in effect, to impair its obligation."

The remedy of an "allowance to be paid out of the debtor's estate" provided for in Section 77 (c) (12) under which the Commission would have sole power to fix the maximum amount of the Corporate Trustee's contract claim and lien and which would be subject to the other conditions and restrictions of that provision, set forth at pages 27 and 28 hereinafter, is not an effective equivalent for the contractual right to reasonable compensation and expenses secured by a lien, the amount of which is to be adjudicated by the Court. The difference between the two is so fundamental as substantially to lessen the value of that contract and to impair the Corporate Trustee's substantive rights to a lien thereunder. A comparison between them will dispel any doubt on that point.

Under the provisions of the Mortgage and under the common law: (1) the Corporate Trustee has a contract right to reasonable compensation and expenses (including counsel's compensation and expenses), for all services rendered by it in the execution of the trust, secured by a lien or charge upon the mortgaged property (all as conceded by the District Court in the New Haven decision); (2) it is entitled under the laws in force at the time the Mortgage contract was entered into in 1901 and which became a part of the obligation, to have the amount and extent of that claim and lien adjudicated by a court, which will feel bound to exercise its independent judgment, uninfluenced by any prior determination of an administrative agency, in measuring the value of the services of the Corporate Trustee and of its attorneys by standards which have long been properly employed by the courts in fixing compensation, which include the difficulty and intricacy of the matters presented, the amount involved, the results attained, the time spent and the experience and qualifications of the persons properly performing such services (see *In re Osofsky*, 50 Fed. (2d) 925, D.C.S.D. New York, 1931 at p. 927); (3) it is entitled to compensation and expenses for all services performed by it in the execution of the trusts created by the Mortgage, irrespective of whether they were directly and materially beneficial to the estate as a whole and contributed directly and materially to the accomplishment of the reorganization; and (4) it is entitled to a right of review by a court which has power to raise, as well as lower, the maximum limits fixed by the Commission.

Compared with the right to compensation and expenses to which the Corporate Trustee is entitled under its Mortgage contract, as well as under the common law, the right under Section 77 (c) (12) (if applicable, which we deny) is not an effective equivalent, but an illusory substitute.

Thus, under that statute: (1) the Corporate Trustee is deprived of its absolute contract right to compensation, secured by a prior lien, and is given merely permission to ask the Commission for a discretionary allowance; (2) it is deprived of its right to have the Court exercise its independent judgment uninfluenced by any prior determination of an administrative agency, in passing upon the amount of its claim according to definite standards and precedents which have been evolved and applied by the courts in fixing fair compensation for the last 150 years, and it is subjected to the jurisdiction of the Commission to fix any maximum limits it pleases in its uncontrolled discretion and based upon standards not relevant in determining the lien claim of the Corporate Trustee, such as the exigencies of the plan of reorganization, the need of the Debtor for adequate cash working capital and the total of the allowances applied for; (3) its allowance is limited by the extent to which its services have directly and materially benefited the estate as a whole (as distinguished from those services which have benefited only its bondholders) or the plan of reorganization, since those are the standards which the Commission applies in fixing maxima under Subsection (c) (12); and it is deprived of its right to receive reasonable compensation for its services in the execution of the trusts created by the Mortgage that did not directly and materially benefit the estate as a whole or aid in the consummation of the reorganization; and (4) it is not entitled to any right of review by a court which has the power to raise, as well as lower, the maximum limits fixed by the Commission, to which it is constitutionally entitled.

In view of the foregoing it is difficult to find any basis for the conclusion of the District Court in the New Haven decision (see page 19 of Appendix A to Petition for Certiorari) that the same standard of liquidation prevails under Section 77 (c) (12) as under the Mortgage contract.

In the compensation report of Division 4 of the Commission in the New York, New Haven and Hartford Rail-

road Company Reorganization, 247 I.C.C. 677 (August 27, 1941), it was stated at page 696:

"Finally, from all of the foregoing, we believe it is clear that we are not fixing the maximum limits of allowances for services and expenses of mortgage trustees on the basis of the indenture contracts."

The substitution, therefore, of Section 77 (c) (12) for the rights of the Corporate Trustee under its Mortgage contract and under the common law is not a mere change of remedy, but a change of substantive right. That result is not changed one iota by the District Court's reminder that if the reorganization proceedings are dismissed, the Corporate Trustee's lien becomes enforceable.

C

Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be a violation of Section I of Article III of the Constitution of the United States.

In the event that Subsection (c) (12) is held to apply to compensation and expense of a mortgage trustee with a contract claim and lien therefor against the mortgaged property, it would be a violation of Section I of Article III of the United States Constitution.

Under Section I of Article III of the Constitution; the judicial power of the United States is vested exclusively in the Courts. Thus in matters involving private right the judicial power may not be delegated to bodies other than constitutional courts.

The adjudication of the amount of the contract claim and lien of a mortgage trustee for its compensation and expenses is clearly a matter of private right and a judicial function which can be performed only by the courts. Functions traditionally performed only by courts are deemed

within the judicial power of the United States. *Crowell v. Benson*, 285 U.S. 22 (1932) at page 31; *Murray v. Hoboken Land and Improvement Company*, 18 How. 272 (1855).

Furthermore, no standards whatsoever are set up in Section 77 (c) (12) or Section 77 (e) (2) for the determination of such maximum by the Commission. No standards are prescribed in either Subsection for fixing reasonable value. Subsection (c) (12) has delegated to the Commission the power to determine maxima in its uncontrolled discretion. There is nothing in it to prevent the Commission from fixing a maximum based entirely upon the cash position of the Debtor or the total allowances applied for or other considerations not relevant in determining the lien claim of the Corporate Trustee and from arbitrarily cutting compensation requested by the latter to fit within that maximum. But by the express terms of the Mortgage, the Corporate Trustee is entitled to reasonable compensation.

There is a clear distinction between mortgage trustees and other parties mentioned in Subsection (c) (12), such as a committee or counsel for the debtor's trustee. The former accepted their duties and responsibilities and obtained their contractual claim to compensation prior to the enactment of the statute and cannot voluntarily limit these duties and responsibilities. This is clearly set forth by the District Court in the New Haven Decision (see pp. 16-17 of Appendix A to Petition for Certiorari) as follows:

"I cannot accept the view that the petitioners were acting as mere volunteers in the premises.

I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. . . . I find nothing in Section 77 which exonerates mortgage trustees from their equitable

obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1939. See 15 U.S.C.A. 77bbb and 77ooo(c)."

Parties other than mortgage trustees are volunteers in the proceedings, not under any pre-existing duties and responsibilities and may limit the extent and nature of their services or may be willing to take their chances on court allowances within a maximum to be fixed by the Commission. They have no contract claim and lien for their compensation. The amounts of their allowances and the method of determining the same are naturally governed by the statute creating their rights, thereto.

Since Section 77 (c) (12), if applicable, gives a body other than a constitutional court power to make a final decision as to maximum allowances for services and expenses covered by a preexisting contract claim secured by a lien, as to which there is no right of court review and no prescribed standards, it is contrary to Section I of Article III of the Constitution.

POINT III

No case of conflict between Circuit Courts of Appeal at the present time has been made out.

There is no conflict now existing between decisions of Circuit Courts of Appeal. Both the District Court and the Circuit Court of Appeals, 8th Circuit, upheld the inapplicability of Section 77 (c) (12) and the exclusive jurisdiction of the Bankruptcy Court, in the Kansas City, Fort Scott & Memphis Railway Company case. The only decisions to the contrary are the decision of the District Court in the New Haven matter and the decision (for what it is worth), of the District Court in the Fort Dodge, Des Moines & Southern Railroad Co. matter. Thus there is at the present time a conflict of decisions only between decisions of District Courts and the decision of the Circuit Court of Appeals, 8th Circuit.

In the New Haven case, a notice of appeal has been filed in the District Court by the Corporate Trustee, and, in addition, it has filed with the Circuit Court of Appeals, 2nd Circuit, a petition seeking leave to appeal. That petition will come on for hearing on October 5, 1942. Not yet, therefore, has the Circuit Court of Appeals, 2nd Circuit, reviewed the decision of the District Court in the New Haven case. Not until that Circuit Court of Appeals has upheld such decision, or some other Circuit Court of Appeals has rendered a decision which is contrary to the decision of the Circuit Court of Appeals in the Kansas City, Fort Scott & Memphis Railway Company case, will there be a conflict of decisions among Circuit Courts of Appeal.

If that Circuit Court of Appeals agrees with the Circuit Court of Appeals in the Kansas City, Fort Scott & Memphis Railway Company case, this Court might not deem it necessary to decide the question. If, however, there is a conflict between them, there will then be an opportunity for this Court to decide whether to grant certiorari.

CONCLUSION

The Petition for Writs of Certiorari should be denied.

Dated: September 29, 1942

Respectfully submitted,

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Attorneys for Bankers Trust Com-
pany, as Corporate Trustee
under the Refunding Mortgage,
dated August 23, 1901 of The
Kansas City, Fort Scott & Mem-
phis Railway Company.

FITZHUGH MCGREW,
HERBERT F. JULY,
Of Counsel.

FILE 11-1
750 88 1112
Nos. 387-388

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

RECONSTRUCTION FINANCE CORPORATION;
Petitioner,

v.

BANKERS TRUST COMPANY, TRUSTEE,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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1901 of The Kansas City, Fort Scott
& Memphis Railway Company.*

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No. 387-298

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

BANKERS TRUST COMPANY, Trustee,
Respondent.

BRIEF FOR RESPONDENT

Statement

No separate statement of facts or of the question presented is set forth herein, since we are in accord with the statement of facts and with the statement of the question presented as contained in the brief for Petitioner, with the following (a) exception and (b) addition.

(a) We disagree with the last statement in the second full paragraph on page 3 of the Petitioner's Brief, that "it (the Indenture Trustee) has actively participated in such proceedings", but for the purpose of argument in this case we are willing to assume that the statement is correct.

(b) Bankers Trust Company, as Corporate Trustee (hereinafter called "Indenture Trustee") under the Refunding Mortgage of the Kansas City, Fort Scott & Memphis Railway Company, dated August 23, 1901 (hereinafter called the "Indenture"), now holds cash deposited with it subject to the terms of that Indenture in the amount of \$475,127.71.

We are not replying to Point II of Petitioner's Brief that the term "Debtor's Estate" as used in Section 77(c)(12) embraces the total assets of the Debtor, or to Point III that the services rendered and expenses incurred by the Indenture Trustee and its counsel were rendered and incurred "in connection with the proceedings and plan", because the Circuit Court of Appeals in the case at bar has stated that the matters covered therein are not important or controlling on the decision of this case (Rec. pp. 105 and 106).

Summary of Argument.

The Indenture Trustee has a contract right and prior lien upon the mortgaged property created by the Indenture as well as by the common-law, for its reasonable compensation for all services and expenses (including the compensation and expenses of its counsel) rendered and incurred in the execution of the trusts created by the Indenture. The institution of the Section 77 proceedings did not in any degree destroy or impair the validity, scope or extent of that contract right and lien, which covered all of the services and expenses which the Indenture Trustee was under a duty to render and incur for the protection of the trust estate and on behalf of the bondholders, after, as well as before, the inception of the Section 77 proceedings. The Indenture Trustee was not a

volunteer and has consistently denied that it was subject to the conditions of Subsection (c)(12) thereof. It intervened in those proceedings in response to its duties under the Indenture and has relied solely upon its contract claim and lien thereunder for its compensation and expenses.

The language and the legislative history of Section 77(c)(12) fail to show that Congress intended that statute to apply to the claim of an Indenture trustee for compensation and expenses rendered and incurred in the execution of the trusts created by the Indenture, based upon a contractual right and secured by a lien conferred by the Indenture. There was no intent to transfer the Bankruptcy Court's established and exclusive jurisdiction to liquidate such a claim and lien to the Interstate Commerce Commission.

Section 77(c)(12) should be held not to apply to the Indenture Trustee since any decision to the contrary would render that statute unconstitutional for the following reasons:—

Section 77(c)(12), if held to apply to the claim of the Indenture Trustee, would be an unconstitutional denial of its right to judicial review, to which it is constitutionally entitled, since neither the Bankruptcy Court nor the Circuit Court of Appeals has any authority under Section 77(c)(12) or under Section 77(e)(2) to determine whether the reasonable value of the services and expenses of the Indenture Trustee exceeds the maximum allowances therefor fixed by the Commission, and neither of those Courts can take any effective action to have those maximum allowances raised.

Section 77(c)(12), if held to be applicable to the services and expenses of the Indenture Trustee, would be an unconstitutional impairment of its vested property

rights. Congress does not have the power to impair vested property rights by bankruptcy legislation. The application of the above statute does not constitute a mere suspension of or change in the Indenture Trustee's remedy, but constitutes an actual impairment of its substantive right to a lien and to have that lien liquidated under the standards to which it was entitled under its Indenture contract.

Subsection (c)(12) of Section 77, if held to be applicable to the services and expenses of the Indenture Trustee; would be a violation of Section 1 of Article III of the United States Constitution. The adjudication of the amount of the contract claim and lien of an indenture trustee for its compensation and expenses is a matter of private right and consequently a judicial function, which can be performed only by the courts and may not be delegated to the Commission.

ARGUMENT

Introductory Statement

The decision of the Circuit Court of Appeals in the case at bar (Rec. p. 102; reported in 129 Fed. (2d) 122) held squarely that the Bankruptcy Court had jurisdiction to allow the contract claim of the Indenture Trustee for its services and expenses rendered and incurred in the execution of the trusts, without the intervention of the Interstate Commerce Commission under Section 77(c)(12). The opinion rests upon the doctrine which it sets forth that since the Indenture Trustee had a contract claim and prior lien under the terms of the Indenture for compensation for services rendered and expenses incurred by it in the protection of the trust

estate and in the interest of its bondholders, it was entitled to have the Bankruptcy Court liquidate that claim without prior reference to the Commission under Subsection (c) (12) of Section 77. Furthermore, it concluded that this was so even though the services and expenses may have been rendered and incurred in connection with the reorganization plan and proceedings and may have been beneficial to the reorganization proceedings, which facts (said the Court) should add to, rather than detract from, its right to compensation. The core of its decision is contained in the following quotations from the opinion (Rec. p. 102):

p. 106:

"Appellee's claim is based upon its contract, expressed in the refunding mortgage, and is for its services to the trust estate required by that mortgage in fulfilling its duty and obligation to the bondholders secured by the mortgage.

Under Sec. 77 of the Bankruptcy Act the bankruptcy court acquired exclusive jurisdiction of all of the property of the debtor railroad wherever situated. But it took possession of the debtor's property subject to all valid claims against it. Appellee, as trustee under a mortgage conveying a large part of the debtor's estate as security for the payment of certain bonds of the debtor, intervened in the reorganization proceedings in order to protect the rights of the bondholders. In any plan of reorganization of the debtor finally adopted, these bondholders were entitled to fair and equitable treatment, and appellee was a proper party to represent them in the reorganization proceedings. By the terms of the trust indenture it was entitled to compensation for its services rendered in behalf of the bondholders. As a general rule the trustee is entitled to compensation out of the trust estate for

the services rendered and expenses incurred in the protection of the trust. Perry on Trusts and Trustees, Vol. 11, p. 1531; Restatement, Law of Trusts, Vol. I, Secs. 242, 244. *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625; *Hallett v. Moore*, 282 Mass. 380, 185 N. E. 474, 91 A.L.R. 572. In the present case the trust estate was charged with a lien to secure the payment for the trustee's services and expenses properly incurred in the administration of the estate. As the bankruptcy court had possession of the trust estate as a part of the debtor's estate, it was necessary for the appellee to apply to that court for the allowance of its claim.

Nor is the fact that the services of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. The officers of appellee and its counsel gave attention to the steps taken in the proceedings and attended hearings before the court and the Commission. They took part in conferences in regard to the status of the proposed plan of reorganization and in meetings held to work out new plans. But appellee was at all times acting primarily in the interest of the bondholders under the refunding mortgage. The fact that the services of appellee on behalf of the trust estate were also beneficial to the reorganization proceedings should add to, rather than detract from, its right to compensation."

P. 107:

"* * * But the Commission was measuring the reasonable value of appellee's services in the reorganization proceedings to the estate of the debtor. Appellee is not asking for compensation for that service. On the other hand it asks reasonable com-

compensation for the value of its services to the trust estate."

"We think the claim of the appellee was within the jurisdiction of the court below to allow without the intervention of the Interstate Commerce Commission under Sec. 77(c)(12)."

I

Section 77(c)(12) has no application to the claim of an Indenture Trustee for services and expenses rendered and incurred by it in the execution of the trusts, based upon contract and secured by a lien upon the mortgaged estate, and therefore does not apply to the claim of the Indenture Trustee herein.

A

The Indenture Trustee has a contract right and prior lien upon the mortgaged property for all of the services and expenses rendered and incurred by it in the execution of the trusts created by the Indenture.

There can be no doubt that the Indenture Trustee has a contract claim and prior lien upon the mortgaged property for its reasonable compensation and expenses (including the compensation and expenses of its counsel) for all services rendered by it in the execution of the trusts created by the Indenture. Article Twenty-third of the Indenture confers that right and lien in express terms as follows:

"The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

Furthermore, even in the absence of that provision of the Indenture, the Indenture Trustee would have that contract right and prior lien under the well-settled doctrine that a trust fund must bear the expenses of its protection and administration.

See:

Schoenherr v. Van Meter, 215 N. Y. 548 at pages 551-552 and cases there cited, 109 N. E. 625, (Ct. of Appeals 1915);

Hallett v. Moore, 282 Mass. 380, 185 N. E. 474, 480 (Sup. Jud. Ct. of Mass. 1933);

Restatement of the Law of Trusts, Vol. I, Sections 242 and 244;

Perry on Trusts, 7th Ed., Vol. II, at pages 1531, 1535-1536;

Rensselaer & Saratoga R. Co. v. Miller & Knapp, 47 Vt. 146;

McLane v. Placerville & S. V. R. Co., 66 Cal. 606, 6 Pac. 748.

The lien created by a mortgage contract is not affected by the institution of a bankruptcy proceeding. See *Security Mortgage Co. v. Powers*, 278 U. S. 149 (1928), 153, 156.

Furthermore, the existence and validity of the particular kind of lien here involved, covering the compensation and expenses of an indenture trustee, have been upheld in Section 77 proceedings. See *In re New York, New Haven and Hartford Railroad Company, Debtor*, 46 Fed. Supp. 236 (U.S.D.C., Conn., June 3, 1942, set forth in full as Appendix B at p. 59 of Petitioner's Brief). That decision is hereinafter referred to as the "New Haven decision."

There is no basis whatsoever for the contention of Petitioner that the contract right and lien conferred by the Indenture upon the Indenture Trustee for its services and expenses are confined to foreclosure and fail to provide compensation for services performed by the Indenture Trustee occasioned by Section 77 proceedings (Petitioner's Brief, pp. 27-28).

Article Twenty-third of the Indenture, which gives the Trustees the right "to reasonable compensation for all services rendered by them in the execution of the trusts" created thereby, is phrased in the broadest possible terms and under it the Indenture Trustee's contract right and lien cover compensation for *all services* which the Indenture Trustee is required to render. Proceedings under Section 77, which was not enacted until thirty-two years after the date of the Indenture, obviously could not be specifically referred to in the Indenture, but that does not mean that services occasioned by such proceedings are not covered by it, since after default a trustee's powers and duties in the execution of the trusts are not restricted to the specific remedies which are outlined in detail in the Indenture. This is made clear by Article Fourteenth of the Indenture itself, which provides that in case of default, the trustees "may forthwith proceed to protect and enforce their rights and the rights of bondholders under this indenture by a suit or suits in equity or at law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture for interest or for principal and interest, or for the enforcement of any other appropriate legal or other equitable remedy, as the Trustees shall deem most effectual in support of any of their rights or duties hereunder."

Mortgages seldom, if ever, have contained a provision that, in the event of an equity receivership, the trustee shall participate in the receivership proceeding and look after the interests of the bondholders; but, nevertheless, it will scarcely be asserted that the trustee has no duties in such event.

Mortgages could not have defined the various duties which trustees have after default, including in specific detail those to be imposed by future legislation not conceived at the time of execution of the mortgage, without possession of prophetic or clairvoyant powers by the author; but the failure to define duties does not excuse their non-performance. In *Frishmuth v. Farmers' Loan & Trust Co.*, 95 Fed. 5 (C.C.S.D.N.Y. 1899), the court said at page 8:

"* * * The duties assumed by one to whom a railroad mortgage is made for the benefit of bondholders are not those only which are defined by the terms of the instrument. Others are superimposed upon the trustee, created by the relation of the parties and the situation of the trust fund. Although selected by the mortgagor, the trustee is selected to represent as well those who may become the holders of bonds. No one but the trustee can enforce the covenants and conditions of the mortgage, or take proper measures to protect the interests of bondholders in respect to matters not provided for by the terms of the instrument."

See also *In re Denver & R. G. Western R. Co.*, 13 Fed. Supp. 821 (D.C.D. Colo., 1936) in which it has been specifically held that indenture trustees are required to protect the interests of their bondholders in Section 77 proceedings.

It is clear from the foregoing that the terms of the Indenture as to compensation and expenses are broad enough to cover all services and expenses which the Indenture Trustee was required to perform and incur, including its services and expenses occasioned by the Section 77 proceeding.

Petitioner contends (Brief, pp. 28, 35) that the Indenture Trustee had an unfettered option to resign its trust, but instead voluntarily elected to participate in the Section 77 proceedings with knowledge of the provisions of that statute to which it was therefore subject. It is evident therefrom that Petitioner fails to appreciate the fundamental distinction between indenture trustees and volunteers in Section 77 proceedings.

The Indenture Trustee accepted its duties and responsibilities in 1903, long prior to the enactment of Section 77. Those duties involved the execution of the trusts and the protection of the interests of the bondholders, and after default they ripened and became active and responsible. Can Petitioner be arguing that the Indenture Trustee was entitled to abdicate its duties in the execution of the trust, at the very time when their active performance had become most urgent and imperative, merely because by way of innovation a statutory type of reorganization procedure had been created by Section 77? That statute does not in the slightest purport to limit the responsibilities and duties of the Indenture Trustee and the latter could not, of course, voluntarily limit them. On the contrary, the policy of the Congress, as shown by the Trust Indenture Act of 1939, is to require indenture trustees to be vigilant notwithstanding the enactment of Section 77. Section 315(c) of that Act, 15 U.S.C.A., Sec. 7700o(c), reads as follows:

"Duties of the Trustee in Case of Default.

"(c) The indenture to be qualified shall contain provisions requiring the indenture trustee to exercise in case of default (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs."

Petitioner's position was flatly rejected by the District Court in the New Haven decision (see pp. 60-61 of Appendix B of Petitioner's Brief), as follows:

"I cannot accept the view that the petitioners were acting as mere volunteers in the premises.

I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. Certainly this equitable obligation was not precisely to be measured by their possible liability in an action at law for nonfeasance. I find nothing in Section 77 which exonerates mortgage trustees from their equitable obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1939. See 15 U.S.C.A. §§77bbb and 77ooo(c).

• • • this change did not extinguish any rights or obligations growing out of the mortgage indenture nor transform the status of the petitioners from that of responsible trustees to that of volunteers."

Since the Indenture Trustee was not a volunteer, but took the only course open to it in order to protect the interests of its bondholders, there is no substance to Petitioner's contention (Brief, p. 28) that it subjected itself to the conditions of Section 77(c)(12) (Reg. p. 84).

Contrary to the suggestion of Petitioner (Brief, p. 28), the fact that the Indenture Trustee's services were rendered after the date of bankruptcy does not diminish the validity or extent of the lien for compensation for such services. See *Security Mortgage Co. v. Powers*, 278 U.S. 149, 156 (1928), where the court stated concerning a contract for attorneys' fees in a mortgage:

"... The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given. Property subject to a lien to secure a liability still contingent at the time of bankruptcy is not discharged from the lien by the adjudication. The secured obligation survives; and if it is that of a third person is usually unaffected by the bankruptcy. When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable though this occurs after the adjudication."

See also:

In Re American Motor-Products Corporation, 98 Fed. (2d) 774, 775 (C.C.A. 2, 1938).

B

Subsection (c)(12) of Section 77 does not apply to the claim of an indenture trustee for its services and expenses in the execution of the trusts, based upon contract and secured by a lien upon the mortgaged estate.

There is no doubt that prior to the enactment of Section 77(c)(12) the authority to determine the validity, amount, extent and priority of that kind of contract claim and lien had always been vested exclusively in the courts.

It is our position (which has been sustained by the decision of the Circuit Court of Appeals in the case at bar) that Section 77(c)(12) was not intended to apply to the liquidation or enforcement of that kind of contract claim and lien and was not intended to transfer to the Commission the Bankruptcy Court's established and exclusive jurisdiction to liquidate such claim and lien. That position is based upon the following:

(1) The Indenture Trustee's secured claim and lien for its compensation and expenses are exactly like any other claim and lien except that no right is conferred to vote upon the plan. No different treatment is provided for them under Section 77 than for any other claim and lien.

The amount, extent and priority of all secured claims and liens are intended under Section 77 to be adjudicated solely by the Bankruptcy Court and not by the Commission. Subsection (c)(7) provides expressly that the judge shall determine and fix a time within which claims of creditors may be filed and "the manner in which such claims may be filed or evidenced and allowed," and further provides for the division by the judge of creditors and stockholders "into classes according to the nature of their respective claims and interests." An indenture trustee's secured claim and lien are just like any other claim and lien. They are among those for which the plan

of reorganization must provide (Section 77(b)(3); and for which provision must be made before the property may be transferred "free and clear", and before the mortgagee may be required to discharge the mortgage lien (Section 77(b)).

(2) There is a fundamental distinction between compensation under an indenture contract claim and lien for services in the execution of the trusts created by the indenture, and an allowance out of the debtor's estate under Section 77(c)(12) for services in the reorganization proceedings to the estate of the debtor.

Subsection (c)(12) is in terms applicable only to an "allowance to be paid out of the debtor's estate." The Indenture Trustee is not applying here for an "allowance" out of the Debtor's estate under Subsection (c)(12); and its rights do not arise by reason of Section 77(c)(12), but wholly independently thereof. It is seeking to enforce a contract right and a lien therefor conferred upon it both by the Indenture and by the common law in 1903, thirty years prior to the enactment of Section 77 itself.

As stated by the Circuit Court of Appeals in the case at bar (Rec. p. 107):

"* * * But the Commission was measuring the reasonable value of appellee's services in the reorganization proceedings to the estate of the debtor. Appellee is not asking for compensation for that service. On the other hand it asks reasonable compensation for the value of its services to the trust estate."

The courts have several times recognized the distinction under Section 77B between compensation of an inden-

ture trustee under a contract claim and lien created by the indenture, and an allowance out of the debtor's estate.

Thus, in *Straus v. Baker Co.*, 87 Fed. (2d) 401 (C.C.A. 5, 1937), the court clearly distinguished between the right of an indenture trustee to an allowance from the general estate and his right to compensation under the terms of the mortgage from a fund available for bondholders, stating, at page 408:

"The trustee Straus makes claim in the dual capacity of trustee for the bondholders under the mortgage, and as reorganization trustee. If, as the court found, he was active in the matter of the National Hotel cash plan, and those activities were in the interest of the bondholders, and contrary to the interest of the estate as a whole, the court correctly denied him compensation as reorganization trustee. But as trustee for the bondholders he was in any event entitled under the mortgage contract, to an allowance out of the fund."

The same distinction has been recognized in the case of *In re Buildings Development Co.*, 98 Fed. (2d) 841, 843-844 (C.C.A. 7, 1938), in which it was held that if a mortgage trustee does not "claim any priority . . . by reason of the lien provision in the trust indenture", and seeks only an allowance from the general estate, the burden is upon such trustee to show the value of its services "to the debtor apart from the value to the bondholders".

This distinction is clearly recognized by the Circuit Court of Appeals in the case at bar. Thus it said (Rec. pp. 106-107):

"There is nothing in the case of *In re Chick and N. W. Ry. Co.*, D. C., 35 F. Supp. 230, 250, contrary to the opinion expressed here. In that case the

trustees under a refunding mortgage were asking compensation, not under the terms of the mortgage, but under Sec. 77(c)(12) of the Bankruptcy Act. The court properly held that it was without jurisdiction to allow them more than the maximum amount fixed by the Interstate Commerce Commission regardless of whether they were to be paid from the general estate of the debtor or from the property pledged to secure the mortgage under which they were trustees. On the other hand, in *Straus v. Baker Co.*, *supra*, a proceeding under Sec. 77B of the Bankruptcy Act, the court held that a trustee under a mortgage was entitled to compensation out of the property pledged under the mortgage for services to the trust estate."

See the further quotations from its opinion, set forth at pages 5-7, *supra*.

There is no evidence in either the history or the language of Section 77(c)(12) that Congress intended to abolish the above distinction and to make an application for an allowance under that statute the exclusive remedy for compensation of indenture trustees for services in the execution of their trusts and for expenses, for which they have a lien.

(3) The inclusion of the phrase "trustees under indentures" in Section 77(c)(12) does not require any other conclusion. It gives compensation to an indenture trustee who might otherwise receive none, such as a trustee under an unsecured issue or a trustee whose security has no value. But a trustee is not limited to the remedy of an allowance pursuant to Subsection (c)(12) and is not compelled to surrender its contract right to obtain its compensation from the liquidation of its lien by a court. The right conferred by that statute is not man-

datory, but a privilege of which a trustee may take advantage if and to the extent that it falls within the requirements of the statute. In this connection it will be observed that the language of Subsection (c)(12) is permissive in terms. It provides only that the judge "may make an allowance"; he is not required to do so. Thus in *In re A. Hertz, Inc.*, 81 Fed. (2d) 511 (C.C.A. 7, 1936), the court in construing Subsection (c)(9) of Section 77B, which is substantially identical with the phraseology of Section 77(c)(12) here involved, said at page 513:

"The statute defines the groups that *may* be compensated but this in no sense is to be construed as meaning *shall* be compensated."

See also *Teasdale v. Sefton Nat. Fibre Can Co.*, 85 Fed. (2d) 379 (C.C.A. 8, 1936) at page 382.

The distinction between permission to apply for an allowance on the one hand and on the other hand a contract right to compensation, secured by a lien, speaks for itself. Much more specific language than the statute contains is required, we submit, to show that Congress intended to substitute the former for the latter and to deprive a trustee of its pre-existing contract and lien claim for services performed in the interest of the trust estate and the bondholders, and to abrogate the legal incident of that claim: *viz.*, liquidation by the Bankruptcy Court.

The foregoing construction of Subsection (c)(12), which gives an indenture trustee a privilege to avail itself of that statute, but which does not compel it to surrender its right to have its lien liquidated by a court, not only gives full effect to the specific terms of the statute, but (unlike the construction argued for by Petitioner in its

Brief at pages 11-16) also gives (1) full recognition to the status of the Indenture Trustee as a secured creditor under Section 77 with rights equal to all the other secured creditors thereunder and (2) full recognition to the well defined distinction between compensation under a contract claim and lien, and an application for an allowance.

(4) Congress did not intend that Subsection (c)(12) of Section 77 should be applicable to the Indenture Trustee and result in the impractical and unworkable situation suggested in the New Haven decision. In that decision the Court said (p. 63 of Appendix B of Petitioner's Brief): "And if the Judge shall not be satisfied that such maxima permit of allowances which are reasonable, under the Act the Judge may return the petition for reconsideration by the Commission. * * * To be sure this seems a cumbersome procedure for the liquidation of an allowance. Indeed, theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization. * * * And if ever a case shall arise resulting in a final deadlock instead of agreement, *perhaps* the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission." (Italics ours.)

The procedure set forth above by the District Judge in the New Haven decision would almost certainly produce any one or more of the following results: (1) a game of battledore and shuttlecock between the Judge and the Commission, (2) a deadlock between them, or (3) the ultimate blocking of the reorganization of the Debtor. Congress certainly could not have intended that Subsection (c)(12) of Section 77 should result in any of those situations. Nor is the possibility of those results so

theoretical as suggested by the Judge. It is quite conceivable that District Judges with views divergent from the Commission's as to the measure of reasonable compensation might frequently find it impossible to come to an agreement with the Commission on the subject. No better illustration of the possibility of such a deadlock could be found than the case at bar, in which the maximum allowances fixed by the Commission for the Indenture Trustee and its counsel aggregate less than one-third of the total compensation granted to them by the Court. The District Court in the New Haven decision finds no way out of such a dilemma, except that it says: "perhaps the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission." Apparently that is also the only way out of the dilemma that the Petitioner can suggest (Brief, p. 32). No appeal lies from Judges' orders disapproving the reasonableness of reconsidered maxima set by the Commission, because such orders do not constitute "orders of the Court fixing such allowances", which are the only orders appealable under Subsection (c)(12).

Petitioner sets forth various parts of Section 77 (Brief, pp. 37-59 of Appendix A) and refers to reports of Congressional Committees and discussions in Congress (Brief, pp. 13-14) which it alleges show that the purpose of Congress in enacting Section 77 and particularly Subsection (c)(12) thereof was to keep the reorganization costs within reasonable bounds and to prevent extravagance. We do not, of course, deny that policy, which required no such lengthy demonstration. What we do emphatically deny is that Congress, in order to accomplish that purpose, meant to take away the pre-existing jurisdiction of

the Bankruptcy Court over the liquidation of liens for compensation and to confer that jurisdiction upon the Commission. In this connection, we call the Court's attention particularly to the fact that of the five instances of jurisdiction purported to be conferred by Section 77 in connection with compensation (referred to by Petitioner at pp. 9-10 of its Brief) three of them involve jurisdiction conferred upon the Court and not upon the Commission.

We have no quarrel with the above-mentioned statements in Congress, as applicable to the granting of allowances to various parties who have no claim to compensation other than that provided for in that statute. But there is nothing whatsoever in any of those statements to show that Congress had in mind and intended Section 77(c)(12) to cover indenture trustees whose claims to compensation were secured by a lien created in good faith long prior to its enactment and to transfer the District Court's established jurisdiction over the determination of such a claim and lien to the Commission.

Certainly the case of *United States v. Chicago, Milwaukee & St. Paul Railway*, 282 U. S. 311 (1931), referred to by Petitioner (Brief, p. 12) does not furnish the slightest indication that Congress was aiming at such an indenture trustee. There the agreement was an obvious device entered into during and as a part of the reorganization proceedings, the purpose and effect of which were to raise a fund for the payment of compensation by compulsory contributions from the stockholders and to vest in the reorganization managers and various committees complete control of the amount of their compensation payable from that fund, free from all supervision not only of the Commission but of any court. Here the In-

Indenture Trustee has a lien based on a provision in the Indenture entered into in good faith, not during reorganization but long prior to the enactment of Section 77; that provision was not a device to accomplish a particular purpose in a special situation, but was included in substantially similar form in every corporate mortgage before and since that time. The Indenture Trustee is not seeking to evade the jurisdiction of the Court, but is asking the Court to determine the amount of its compensation and expenses.

Nor is the fact, that Section 77 subjects bondholders to the provisions of a plan of reorganization, which is relied upon by the District Court as an analogous situation in the New Haven decision (see pp. 61-62 of Appendix B of Petitioner's Brief), any indication that Section 77 intended to subject the secured claims of indenture trustees for compensation and expenses to the provisions of Subsection (c)(12), since the distinctions between the two situations are clear: (1) the bondholders have a lien the amount of which is definitely fixed by the terms of their indenture contract, while the amount of the lien of indenture trustees has to be determined; (2) the bondholders have been given the additional protection, under the statute, of a two-thirds vote of their particular class before they can be subjected to the plan, and of a clear-cut and established right of appeal while indenture trustees with a lien have no such right to vote and no right of appeal.

The Commission has no jurisdiction unless clearly conferred upon it by Section 77. See *In re Chicago & N. W. Ry. Co.*, 121 Fed. (2d) 791 (C.C.A. 7, 1941), in which the court, in referring to Subsection (c)(12), said at page 800:

“• • • Moreover, the jurisdiction is in the court, unless taken from it and placed in the I.C.C. by this subsection of the statute.”

We submit that opposing counsel have failed to show that Section 77(c)(12) was intended to accomplish that transfer of jurisdiction in respect to indenture trustees holding liens who ask the Bankruptcy Court to liquidate their liens for services and expenses in the execution of the trusts, and that the decision of the Circuit Court of Appeals was correct in holding that the statute does not apply to such an indenture trustee.

That conclusion has been flatly supported in the following decision. In the Report dated December 3, 1940, of William L. West, Esq., Special Master appointed by the District Court in the Erie Railroad Company Reorganization in the District Court of the United States for the Northern District of Ohio, to pass on the claim of the Chase National Bank, a secured noteholder, for legal expenses incurred by it in the enforcement and protection of the collateral securing the note, but not in connection with the proceedings and plan, it was argued against the allowance of that claim that the court had no power to determine the Bank's claim for legal expenses without first referring the matter to the Commission for the fixing of a maximum amount under Section 77(c)(12). The Special Master rejected that contention completely, saying in his report:

“Furthermore, this claim involves the adjudication of a substantive right created by contract, for the Bank's right to have its reasonable expenses, including counsel fees, allowed as part of its secured claim arises by virtue of contract—i.e., the terms and provisions of the Debtor's note—and not by

virtue of the provisions of the Bankruptcy Act relating to 'allowances'. Thus, apart from the terms of the Debtor's note, the Bank would not be entitled in this proceeding to the allowance of its claim for expenses.

Under the circumstances, this claim is not compensable as an 'allowance' under the Bankruptcy Act so as to require action by the Commission with regard to the fixing of a maximum amount."

It should be noted that in *Matter of the Fort Dodge, Des Moines & Southern Railroad Co.*, referred to at page 10 and in Appendix C of the Petitioner's Brief; counsel for the indenture trustee, The New York Trust Company; did not appear and argue the case or file a brief.

Furthermore, as shown hereinafter under points II A, B and C (pp. 25-50), if Section 77(c)(12) is held to be applicable to the Indenture Trustee having a claim secured by a lien, it would render that Subsection of the statute invalid as an unconstitutional denial of its right to judicial review and as an unconstitutional impairment of its property rights, all in violation of the Fifth Amendment of the Constitution of the United States, and as a violation of Section 1 of Article III thereof. The Court below was right in construing Section 77(c)(12) as not applicable to the Indenture Trustee, since a contrary construction would render it unconstitutional.

The Court below did not pass on the constitutional points, because they were pertinent only if the intent of Section 77(c)(12) had been construed to require the judge to permit the Interstate Commerce Commission to fix the maximum limits of the compensation and expenses of the Indenture Trustee. The District Court in the New Haven decision, however, construed the intent of Section 77(c)(12) to require the judge to permit the Commission to fix

the maximum limits of such compensation and expenses in the first instance and held that there was no basis for the constitutional objections, which were the same objections as are raised in this proceeding. So far as we can ascertain, no other court has specifically passed upon these constitutional objections.

II

The decision of the Circuit Court of Appeals should be upheld, since any decision which should hold that Section 77(c)(12) was applicable to the Indenture Trustee would render that statute unconstitutional.

A

Subsection (c)(12) of Section 77, if held applicable to the Indenture Trustee, would be an unconstitutional denial of its right to judicial review in violation of the Fifth Amendment of the Constitution of the United States.

It is our contention, that if the maximum limits are to be fixed by the Commission under Subsection (c)(12), we are constitutionally entitled to a review of such maxima by some court, either the District Court or an Appellate Court, *with power to raise those maximum limits. We contend that no such right of review exists.*

• Although the District Court is given the authority under that statute to make an allowance which may be less than the maximum fixed by the Commission, it is clear from the following authorities that the District Court has no power to pass upon whether the reasonable value of the services exceeds that maximum and that it may not raise that maximum.

Thus, in *In re Chicago, M., St. P. & P. R. Co.*, 121 Fed. (2d) 371 (C.C.A. 7, 1941), the court, after a study of Section 77(c)(12) itself and the history of the Congressional Records leading to its passage, said at page 374:

"Our reading of the statute convinces us that Congress contemplated a plan (which it enacted) whereby the I.C.C., not the District Court, should fix the maximum allowances to attorneys; and within that allowance the court was to exercise its judgment.

"* * * The court was ultimately to determine the amount of the fees, but its action was limited by the maximum fixed by the Commission."

In *In re Chicago & N. W. Ry. Co.*, 35 Fed. Supp. 230 (D.C.N.D. Ill., 1940), the court said at page 258:

"But whether the reasonable value of the services exceeds the maximum limits fixed by the Commission is, so far as this court is concerned, an academic question which this court has no power to determine and which it accordingly must decline to examine."

See to the same effect the opinion in *Warren v. Palmer* (C.C.A. (2d) October 8, 1942, not yet reported), portion quoted at page 35 hereof; *In re Chicago, G. W. R. Co.*, 29 Fed. Supp. 149 (D.C.N.D. Ill., 1939), at page 162 and *Chicago and North Western Railway Co. v. United States of America, et al.* (Civil Action No. 2810 D.C.N.D. Ill., May 29, 1941, not yet reported) portion quoted at page 35 hereof.

Those decisions leave no doubt that the District Court has no jurisdiction whatsoever over the adequacy of the maximum and cannot take any effective action to have it

raised. Contrary to the contention of the Petitioner (Brief, pp. 10 and 29), those decisions are not in accord with the New Haven decision discussed below.

In the New Haven decision, the District Court rejected the theory of those cases and held that if it determined that the maximum set by the Commission was less than reasonable it could, as part of its authority over the plan of reorganization under Subsection (e)(2) of Section 77, return the petition for reconsideration by the Commission. It concluded that therefore the Indenture Trustee was not unconstitutionally deprived of its right to judicial review (see pp. 64-65 of Appendix B of Petitioner's Brief). Petitioner makes the same point in its Brief (see pp. 31-33).

Subsection (e)(2) provides as follows:

"* * * After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: * * * (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, *are within such maximum limits as are fixed by the Commission, and are within such maximum limits* to be subject to the approval of the judge; * * * (Italics ours.)

We submit that the foregoing interpretation of that Subsection adopted by the District Court in the New Haven decision and by Petitioner is erroneous for the following reasons:

(1) Plainly that interpretation is contrary to the foregoing cases which hold that the exercise of the Court's judgment as to allowances is limited absolutely by the

maximum fixed by the Commission and that the Court has power only to diminish that maximum.

(2) The interpretation of Subsection (e)(2) by the District Court in the New Haven decision and by Petitioner is clearly contrary to the intent of Congress in enacting that Subsection, as shown by the language and history thereof.

Subsection (c)(8) of Section 77, as enacted March 3, 1933, provided that the judge might, within such maximum limits as should be fixed by the Commission as elsewhere provided in Subdivision (f) of Section 77, allow a reasonable compensation for services rendered and reimbursement for actual and necessary expenses incurred in connection with the proceeding and the plan. Subsection (f) provided that the Commission should fix the maximum compensation and reimbursement which might be allowed by the court pursuant to Subsection (c)(8). Subsection (g), which was the predecessor of the present Subsection (e)(2), provided that the judge should confirm the plan if satisfied that "all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, for services or expenses, incident to the reorganization and cost of financing, have been fully disclosed *and are reasonable*, or are to be subject to the approval of the judge." (Italics ours.) It will be observed that there was no reference therein to "maximum limits". Thus, if the District Court in the New Haven decision had been construing the old Subsection (g) instead of its present version (e)(2), its conclusions might be supported.

Subsection (e)(2), however, which superseded the foregoing Subsection (g) in the 1935 Amendments to Section 77, provides that the judge shall approve the plan, if

satisfied that the allowances are " * * * reasonable, are within such maximum limits as are fixed by the Commission and are within such maximum limits to be subject to the approval of the judge; * * *". (Italics ours.)

The Court will note that in order to make sure that the limitation contained in Subsection (c)(12), in regard to maxima, which was not contained in the old Subsection (g), was carried over into the present Subsection (e)(2), the phrase "are within such maximum limits" was inserted twice in Subsection (e)(2).

Thus the interpretation placed upon Subsection (e)(2) by the District Court in the New Haven decision and by Petitioner is specifically negated by the language of that provision and the history of its enactment, both of which show an emphatic determination on the part of Congress to prevent that interpretation and to make Subsection (e)(2) conform to Subsection (c)(12) in confining the authority of the District Court within the maxima fixed by the Commission.

(3) The interpretation of Subsection (e)(2) by the District Court in the New Haven decision and by Petitioner is also contrary to the intent of Congress in enacting Subsection (c)(12), as shown clearly by the discussion in the Senate and by the testimony at the hearings before the House Judiciary Committee, leading to its passage.

Thus the following discussion occurs in the Senate on consideration in 1933 of paragraph (c)(8), predecessor of the present Subsection (c)(12) (76 Cong. R. 5130):

"Mr. LaFollette: Mr. President, the amendment to which the Senator refers provides, I understand, that the maximum limit shall be set by the Interstate Commerce Commission and within that

maximum limit the district judge may fix the commissions.

Mr. Clark: But the court can not go above the amount fixed by the commission.

Mr. LaFollette: That is correct. I said 'within the maximum limit.'

Mr. Robinson of Arkansas: The Senator is correct. The Interstate Commerce Commission ascertains what will be the maximum amount to be allowed, and the court within that limit may make the allowance."

In the colloquy in which Commissioner Mahaffie of the Commission was testifying as to Section 77(c)(12) at the hearings in April, 1935, before the House Judiciary Committee on the proposed amendments to Section 77 (quoted by the Court in *In re Chicago, M., St. P. & P. R. Co.*, 121 Fed. (2d) 371, *supra*, at p. 374), it was stated:

"Mr. Celler (Member of the House Judiciary Committee): It is true, though, that the court has very little to do under those circumstances.

Mr. Mahaffie: The court has to fix the actual fee and may have to hold a hearing on it.

Mr. Hancock (Member of the House Judiciary Committee): You anticipate that the maximum fee fixed will be the fee allowed and will also be the minimum fee, do you not? In other words, there will be no discretion left to the judge at all, as a matter of fact.

Mr. Mahaffie: I would not want to say that the court would not use some discretion under the statute. I anticipate that we will be the limiting factor on fees, however, if this proposed law is passed.

Mr. Celler: For practical purposes there would be no discretion left in the court except as to your maximum which would be quite low, I imagine, considering all the facts.

Mr. Mahaffie: I think that is substantially what has happened under section 77 as to the fixing of salaries; yes sir. We have fixed which we called a maximum and I think the courts have almost uniformly paid it."

From which the Circuit Court of Appeals in that case concluded as follows:

"Our reading of the statute convinces us that Congress contemplated a plan (which it enacted) whereby the I.C.C., not the District Court, should fix the maximum allowances to attorneys, and within that allowance the court was to exercise its judgment. . . .

To accomplish the result thus sought, the I.C.C. was empowered (and required) to fix the ceiling,—the maximum of fees and expenses for the various counsel representing the numerous claimants. The court was ultimately to determine the amount of the fees, but its action was limited by the maximum fixed by the Commission."

In the Report of the same hearings, the following occurred at page 85:

"Mr. Burgess (counsel for insurance companies): . . . I am not sure whether that maximum is appealable. Are you, Mr. Craven? That is, can the fixation of a maximum by the Commission be appealed under this act?

Mr. Craven (counsel for Commissioner Eastman in drafting the 1933 Act): I think not.

Mr. Burgess: You think not?

Mr. Craven: That is my recollection of it.

Mr. Celler (Member of the House Judiciary Committee): Even if the court would accept the maximum there would be no appeal from the court's ruling?

Mr. Burgess: I do not know of any appeal that you can take from the Commission's fixation of a maximum under this act.

Mr. Celler: That does not seem right.

Mr. Burgess: That is an appeal from the court's fixation, of course, but that would have to be within the maximum, so I do not know of any appeal.

Mr. Celler: That leaves the entire matter in the hands of the Interstate Commerce Commission, practically speaking.

Mr. Michener: Yes.

Mr. Burgess: Yes.

Mr. Celler: With no right of appeal at all if the maximum is accepted by the court?

Mr. Burgess: That is my understanding. If Mr. Craven has a different view, I should be glad to accept his view.

Mr. Craven: That is my understanding of it."

Thus the language of Subsection (c)(12), its history, the announced intention of Congress in enacting the legislation and all of the decisions construing the same (except the New Haven decision) are uniform in showing that the Commission was intended to be the limiting factor on allowances and that the authority of the District Court to exercise judgment in the matter was to be confined within the Commission's maxima. It follows that in so far as Subsection (c)(2) of Section 77 appears to give the Court the right to pass upon reasonableness, the Court is confined thereunder to determining whether the fixed limits are unreasonably high, and that it has power only to diminish the allowances. The decision of the District Court in the New Haven matter, whereby the Court purported to have the power to exercise a veto over all of

the Commission's maxima on the ground that they were unreasonably low, is equivalent to a holding that the Court itself has power under Subsection (c)(12) to fix the allowances and is therefore directly contrary to the intent of the statute and, we submit, is erroneous, since it in effect vests final control over their amount in the Court instead of in the Commission.

There is a fundamental distinction between the power of the District and Circuit Courts over a plan of reorganization, and their power to review maximum limits of allowances. Under the former the courts are not bound by the plan proposed by the Commission. If one plan or fifty plans submitted by the Commission appear to the courts to be unreasonable, one and all can be rejected by the courts. Under Subsection (c)(12), on the contrary, if the Commission should allow a maximum of \$50 for services which the Court considered to be worth \$10,000, the Court could do nothing to raise the maximum or to compel the Commission to do so.

The right of appeal to the Circuit Court of Appeals furnished by Subsection (c)(12) does not satisfy the requirements of judicial review, because that right is confined to appeals from "orders of the Court fixing such allowances." That subsection furnishes no authority whatever for an appeal from the maximum fixed by the Commission, and that authority is not contained anywhere in the statute. See to that effect testimony of Mr. Burgess and Mr. Craven before the House Judiciary Committee set forth at pages 31-32, *supra*. On appeal from the District Court's orders, the Circuit Court of Appeals cannot determine whether the maximum is unreasonably low, since the District Court in making the order appealed

from cannot pass upon that question. Thus in *Warren v. Palmer, supra*, which involved the question whether attorneys who appeal from the order fixing their allowance under Section 77(c)(12) must obtain leave to appeal or may do so as of right, the Circuit Court of Appeals said:

“ . . . for in no case can an attorney in a railroad reorganization receive more than the maximum fixed by the Interstate Commerce Commission under §77(c)(12); so that in practice the only issue which such appeals can raise is whether the district judge was wrong in not awarding the whole or some part of the difference between the ‘ceiling’ fixed by the Commission and the amount which he did award.
• • • ”

As shown by all of the foregoing, both the District Court in making its order and the Circuit Court of Appeals in reviewing it are confined under Subsection (c)(12) to a determination of reasonableness within the maximum fixed by the Commission.

Contrary to the contention of Petitioner (Brief p. 32), there is nothing whatever in the statute which authorizes the Circuit Court of Appeals to remand any finding on maximum allowances to the Commission at any stage of the proceedings. Even if that were possible, the Court would be powerless to fix the sum to be awarded and the Indenture Trustee's only remedy would consist of a succession of expensive appeals to the Circuit Court of Appeals from successive inadequate maxima fixed by the Commission.

Contrary to the contention of the Attorney for the Trustees of the New Haven Railroad, contained at pages 7-9 of his brief *Amicus Curiae* filed herein, there is no right of appeal under the Urgent Deficiencies Act from the maximum limits fixed by the Commission. See *Chicago*

and North Western Railway Company v. United States of America, and Interstate Commerce Commission (Civil Action No. 2810 D.C.N.D. Ill., May 29, 1941, not officially reported), which arose on an appeal to a statutory three-judge court under the Urgent Deficiencies Act, for an injunction setting aside an order of the Commission which refused to make an allowance for the costs of an appeal by the debtor therein from the approval of the plan of reorganization. There the court in holding that it did not have jurisdiction of the appeal said in referring to Section 77(c)(12):

"This section provides a complete scheme for the handling of expenses of reorganization—first, the I.C.C. passes upon the maximum amount which may be devoted to a specific expense, then the district court further checks such allocation, *and is granted power only to diminish the same; and then the aggrieved party may challenge the District Court's determination by immediate and summary appeal to the Circuit Court of Appeals.*" (Italics ours.)

See also *Warren v. Palmer*, referred to at page 34, *supra*, in which the court said "*for in no case can an attorney in a railroad reorganization receive more than the maximum fixed by the Interstate Commerce Commission under Section 77(c)(12); * * **" (Italics ours.)

Nor is the remedy of mandamus available to determine whether the Commission has made a reasonable allowance, since it is axiomatic that mandamus will not lie to control or review the exercise of discretion (in the absence of patent abuse).

From all the foregoing, we submit that there is no right of judicial review from the Commission's maxima with power in the Court, directly or indirectly, to raise them and that the District Court's conclusion in the *New*

Haven decision, that the Indenture Trustee's constitutional right to judicial review has been safeguarded, is clearly unsound. That the Indenture Trustee has a right to judicial review as to other aspects of allowances of compensation (Petitioner's Brief, page 33) does not, of course, cure that constitutional deficiency, but merely emphasizes it. That the District Court and the Circuit Court of Appeals can revise the maximum downward, or make no allowance at all, is not germane to the issue here presented.

Of course, the right to a rehearing before the Commission (Petitioner's Brief, p. 30) does not satisfy the constitutional right of the Indenture Trustee to a determination by a court. Two or more hearings by an administrative body are not the equivalent of one court hearing.

Petitioner's references to "coordinated regulatory power" (Brief, p. 14) and "coordinated action" (Brief, p. 32) of the Commission and of the court, under Subsection (c)(12), are not accurate descriptions of the real situation since they suggest equality of authority between these two tribunals, whereas, as shown above, under Subsection (c)(12) complete and exclusive control of maximum allowances is vested in the Commission and the court is confined to action subordinate to and limited by those maxima.

Since Subsection (c)(12) makes no provision for any judicial review *upward* from the maximum of the Commission, which is binding and conclusive, it is unconstitutional if held to be applicable to the determination of the contract right and lien of the Indenture Trustee for compensation and expenses.

We conclude therefore that the court below was right in construing Section 77(c)(12) as not applicable to the Indenture Trustee, since a contrary construction would render it unconstitutional.

It is well established that legislation, whether of Congress or of the States, cannot constitutionally make the determination of an administrative body binding and conclusive in a matter involving a constitutional question and take away the right to the independent review of a court. In the case at bar the constitutional matter involved is the Indenture Trustee's claim and lien for reasonable compensation and expenses (to be determined according to the recognized standards set forth in Point II, B(b), *infra*, pp. 40-48) and to be protected against an allowance inadequate and unrelated to real value, which would amount to a deprivation of property without due process of law.

In *U. S. v. New River Collieries*, 262 U. S. 341 (1923), the Court said at pages 343-344:

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

See also *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U. S. 418 (1890), at pages 457, 458.

Furthermore, it is well settled that a statute under which an administrative body acts must always provide for a right of judicial review to determine whether the decision of the administrative body was contrary to law or to the evidence or without evidence to support it.

See:

Denver Union Stock Yard Co. v. United States,
57 Fed. (2d) 735 (D.C.D. Colo., 1932);

Tagg Bros. v. United States, 280 U. S. 426 (1930),
at page 444.

B

Subsection (c)(12) of Section 77, if held to be applicable to the services and expenses of the Indenture Trustee, would be unconstitutional on the separate and additional ground that it would impair its property rights in violation of the Fifth Amendment of the Constitution of the United States.

(a) Congress has no power under its bankruptcy powers to impair vested property rights.

As shown under Point I (pp. 7-25, *supra*), under both the Indenture and the common law, the Indenture Trustee has a contract right to reasonable compensation and expenses and has a prior lien or charge therefor upon the mortgaged property. It is our contention that the Indenture Trustee has the right to have the amount, validity and priority of that contract right and lien determined exclusively by the Bankruptcy Court and charged by it against the mortgaged property, including the cash amounting to \$475,127.71 now deposited under the Indenture, and that if Congress has attempted to substitute therefor the right to have the Commission determine the maximum amount of that right and lien under Section 77(c)(12), that statute, if applied to the Indenture Trustee, is an unconstitutional impairment of its vested property rights in violation of the Fifth Amendment to the Constitution. The District Court properly ordered the compensation and expenses of the Indenture Trustee to be paid from such deposited cash.

It is well settled that the bankruptcy power of Congress is subject to the Fifth Amendment and that, accordingly, Congress does not have the power to impair vested rights or liens by bankruptcy legislation.

See:

Louisville Bank v. Radford, 295 U. S. 555 (1935),
at pages 589, 594, 601-602;

Continental Bank v. Rock Island Ry., 294 U. S.
648 (1935), at pages 676-677, 681.

In *Security-First National Bank v. Rindge Land & Navigation Co.*, 85 Fed. (2d) 557 (C.C.A. 9, 1936), the Court said at page 561:

"The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendments to the Constitution. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 594."

See to the same effect:

In re American Motor Products Corporation, 98
Fed. (2d) 774 (C.C.A. 2, 1938), at page 775;

In re Utilities Power & Light Corporation, 91
Fed. (2d) 598 (C.C.A. 7, 1937), at pages 600-
601; cert. denied 302 U. S. 742;

Guaranty Trust Co. v. Hemwood, 86 Fed. (2d) 347
(C.C.A. 8, 1936), at page 352; cert. denied
300 U. S. 661.

Nor does Congress have any power to impair vested property rights under its power to regulate interstate commerce since the latter power, like the bankruptcy power, is subject to the Fifth Amendment. See *Menongahela Navigation Co. v. United States*, 148 U. S. 312 (1893), at page 336, and other cases cited in footnote to page 589 of *Louisville Bank v. Radford*, 295 U. S. 555.

(1935), *supra*, at pages 589-590. Thus the invocation of the commerce power by the attorney for the Trustees of the New Haven Railroad (pp. 4-5 of his *Amicus Curiae* brief herein), requires no reply.

Petitioner fails to distinguish between the impairment of obligation of contract and the impairment of a vested property right. See *Louisville Bank v. Radford*, *supra*, at pages 589-590, where that distinction is made clear. We are not invoking the prohibition against impairment of obligation of contract, which we realize is not applicable to action by Congress. The cases of *Kuehner v. Irving Trust Co.* and *Philadelphia B. & W. R. Co. v. Schubert*, cited by Petitioner at page 28 of its Brief, are concerned solely with that matter and do not involve a lien or other property right and thus have no application to the case at bar. What we do contend is that Subsection (c)(12), if held to subject the Indenture Trustee's claim and lien to the jurisdiction of the Commission, would be an impairment of its vested property rights in violation of the Fifth Amendment of the Constitution.

(b) Section 77(c)(12), if applicable to the Indenture Trustee, would not be a mere suspension of or change in its remedy, but would be an impairment of its substantive property rights.

The District Court in the New Haven decision said (see pp. 63 and 66 of Appendix B of Petitioner's Brief):

"The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such

a suspension of the remedy is not inconsistent with the Constitution."

"Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the liens are suspended during these proceedings: they may be enforced only if these proceedings are dismissed."

We submit that those conclusions are erroneous because an actual and serious impairment of substantive property right, and not a mere suspension of remedy, is involved.

This is shown by a comparison between the remedy of an "allowance to be paid out of the debtor's estate" provided for in Section 77(c)(12) under which the Commission would have sole power to fix the maximum limit of the Indenture Trustee's contract claim and lien and which would be subject to the other conditions and restrictions of that statute, set forth at pages 43-45 hereinafter, and the contractual right to reasonable compensation and expenses secured by a lien, the amount of which is to be adjudicated by the Bankruptcy Court. The difference between the two is so fundamental as substantially to lessen the value of that lien and to impair the Indenture Trustee's substantive property rights to a lien thereunder.

Under the provisions of the Indenture and under the common law:

(1) The Indenture Trustee has a contract right to reasonable compensation and expenses (including counsel's compensation and expenses), for all services rendered by it in the execution of the trust, secured by a lien or

charge upon the mortgaged property. This has been fully sustained by the District Court in the New Haven decision. (See pp. 59-61 of Appendix B of Petitioner's Brief.)

(2) It is entitled under the laws in force at the time the Indenture contract was entered into by the Indenture Trustee in 1903 and which became a part of the obligation, to have the amount and extent of that claim and lien adjudicated by a court, which will feel bound to exercise its independent judgment in measuring the value of the services of the Indenture Trustee and of its attorneys by standards which have long been properly employed by the courts in fixing compensation. Those standards include the difficulty and intricacy of the matters presented, the amount involved, the results attained, the time spent and the experience and qualifications of the persons properly performing such services (*In re Osofsky*, 50 Fed. (2d) 925 (D.C.S.D. New York, 1931), at p. 927).

(3) It is entitled to compensation and expenses for all services performed by it in the execution of the trusts created by the Indenture, irrespective of whether they were directly and materially beneficial to the estate as a whole and contributed directly and materially to the accomplishment of the reorganization. As stated by the Circuit Court of Appeals in its opinion in the case at bar (Rec. p. 106), the fact that the services of the Indenture Trustee on behalf of the trust estate were also beneficial to the reorganization proceedings should add to its right to compensation, rather than detract therefrom (*supra*, p. 6).

(4) It is entitled to a right of review by a court which has power to raise, as well as lower, the maximum limits fixed by the Commission.

Compared with the foregoing right to compensation and expenses to which the Indenture Trustee is entitled under its Indenture contract and lien, as well as under the common law, the right under Section 77(c)(12) (if applicable, which we deny) is not an effective equivalent, but an illusory substitute amounting to a deprivation of property.

Thus, under that statute:

(1) The Indenture Trustee is deprived of its absolute contract right to compensation, secured by a prior lien, for services in the execution of the trusts, and is given merely permission to ask the Commission for a discretionary allowance.

(2) It is deprived of its right to have the Court exercise its independent judgment in passing upon the amount of its claim according to definite standards and precedents which have been evolved and applied by the courts in fixing fair compensation for the last 150 years. Instead, it is subjected to the jurisdiction of the Commission to fix any maximum limits it pleases in its uncontrolled discretion and based upon standards not relevant in determining the lien claim of the Indenture Trustee, such as the exigencies of the plan of reorganization, the need of the Debtor for adequate cash working capital and the total of the allowances applied for.

(3) Its allowance is limited by the extent to which its services have directly and materially benefited the estate

as a whole or the plan of reorganization (as distinguished from those services which have benefited only its bondholders), since those are the standards which the Commission applies in fixing maxima under Subsection (c) (12).^{*} It is deprived of its right to receive reasonable compensation for its services in the execution of the trusts created by the Indenture that did not directly and materially benefit the estate as a whole or aid in the consummation of the reorganization^{**}, having been rendered

^{*} In the Supplemental Report of Division 4 of the Commission on the petitions for rehearing on compensation in the Missouri Pacific Railroad Company Reorganization, 247 I.C.C. 273 (June 30, 1941), the Commission said at page 278:

"The doctrine has been clearly established that the debtor's estate should be charged with only such services as are found to have benefited it. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor*, United States Circuit Court of Appeals, Seventh Circuit, May 20, 1941. * * * We find that much of the time devoted by this petitioner in the performance of its services did not benefit the general estate of the debtor."

See to the same effect: *Savannah & Atlanta R. Co. Reorganization*, 228 I.C.C. 543 (1938), at page 558, and *Erie Railroad Company Reorganization Supplemental Report of Division 4*, November 15, 1940, at page 4.

^{**} Thus, it has been established that services performed for the benefit of a particular party or group and which did not benefit the Debtor's estate as a whole are not compensable under Section 77(c)(12). See *New York, New Haven and Hartford Railroad Company Reorganization*, 247 I.C.C. 677 (August 27, 1941) at page 764, in which the Commission denied an allowance under Section 77(c)(12) to a holder of debentures of a subsidiary of the Debtor for counsel fees, saying:

"All of the activities of the petitioner in these proceedings, in our opinion, were primarily in their own interest and behalf. We find that neither the estate of the principal debtor nor that of the Old Colony was benefited by them. Accordingly, we are unable to fix maximum limits of allowances therefor in these proceedings."

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and incurred exclusively for, and resulting in the benefit and protection of a particular group—the holders of the Bonds secured by the Indenture.

(4) It is not entitled to any right of review by a court which has the power to raise, as well as lower, the maximum limits fixed by the Commission, to which it is constitutionally entitled.

In view of the foregoing it is difficult to find any basis whatsoever for the conclusion of the District Court in the New Haven decision (see p. 62 of Appendix B of Petitioner's Brief) that the same standard of liquidation prevails under Section 77(c)(12) as under the Indenture contract.

We submit that the Commission, by its own admission, has made it abundantly clear that the two standards of liquidation are not the same. Thus in the compensation report of Division 4 of the Commission in the New York, New Haven and Hartford Railroad Company Reorganization, 247 I.C.C. 677 (August 27, 1941), it was stated at page 696:

"Finally, from all of the foregoing, we believe it is clear that we are not fixing the maximum limits of allowances for services and expenses of mortgage trustees on the basis of the indenture contracts."

Certainly the use of the word "reasonable" in both the statute and the Indenture does not make the two standards of liquidation the same, when, as shown herein, the standards employed by the Court and those employed by the Commission, in determining reasonableness are so fundamentally different. No more persuasive proof of that difference and that the Indenture Trustee would suffer a serious injury to its property rights under the

standards applied by the Commission, can be found than by a comparison between the amounts of compensation granted by the District Court and of the maxima of allowances set by the Commission in this very case. Thus, while the District Court granted compensation (which it necessarily must have regarded as reasonable) in the sums of \$10,000 to the Indenture Trustee, \$10,000 to White & Case, and \$6,000 to Bryan, Williams, Cave & McPheeters, the maximum allowances fixed by the Commission for those services were \$2,500, \$3,500 and \$2,000, respectively, aggregating less than one-third of the total compensation granted by the Court. The Circuit Court of Appeals recognized that this large discrepancy between the amount of compensation granted by the Court and the amount of allowances granted by the Commission, was due to a difference between the standards of compensation applied by the Commission and those applied by the Court. Thus it stated in its opinion (Rec. p. 107):

“ * * * But the Commission was measuring the reasonable value of appellee's services in the reorganization proceedings to the estate of the debtor. Appellee is not asking for compensation for that service. On the other hand it asks reasonable compensation for the value of its services to the trust estate. We find nothing in the record which would justify us in overruling the decision of the bankruptcy court upon the necessity or propriety of the services rendered by the appellee to the trust estate nor upon the value of the services rendered.”

Surely these results all show conclusively that something much more fundamental than the method and forum for determining compensation is altered if Section 77(c)-(12) is substituted for the rights of the Indenture Trustee under its contract and lien.

- In this connection also we call the Court's attention to the fact that the statistics set forth at page 12 of the Petition for Writs of Certiorari in this case show that the standards of compensation employed by the Commission seem to be particularly prejudicial to indenture trustees. The maxima allowed to them in nine reorganization proceedings set forth at page 27 of that Petition have aggregated only 37.4 per cent of their claims, as compared with aggregate allowances of 47.9 per cent of the amounts claimed by all parties (excluding compensation and expenses of debtor's trustees, and expenses of reorganization managers). Furthermore, this discrepancy would be considerably greater if indenture trustees had been excluded in computing the above figure of 47.9 per cent. It is our belief that this substantially lower rate of compensation awarded to indenture trustees is undoubtedly due to the failure of the Commission to grant adequate compensation to them for their services which benefited the trust estate and the bondholders, but which were not beneficial to the debtor's estate as a whole or the reorganization. This belief is substantiated by the statement of Petitioner in its brief (p. 34) that the Commission is in a position to apply a uniform standard in fixing maximum allowances. That standard is, as has been shown at pages 43-44, *supra*, benefit to the debtor's estate as a whole and to the plan of reorganization. No clearer proof of injury to the property rights of indenture trustees could be found than the uniform application of that standard in determining the value of their services to the trust estate and to their bondholders.

If Petitioner's contention that the Commission is peculiarly qualified to pass on the maximum allowances (pp. 33-34 of its Brief) is intended to refer to indenture trustees and their attorneys, we strongly disagree with it.

Except in unusual circumstances, by far the larger part of an indenture trustee's services are performed entirely before the Court, which alone has first-hand knowledge of their extent and value, and only a relatively small proportion is performed before the Commission. For example, see the opinion of the District Court of Connecticut in *In re New York, New Haven and Hartford Railroad Company, Debtor*, 46 Fed. Supp. 214 (U.S.D.C. Conn., June 3, 1942), at pages 228 to 236.

It is clear from all of the foregoing that the substitution of Section 77(c)(12) for the rights of the Indenture Trustee under its Indenture contract and under the common law is not a mere change in the mode of procedure of liquidating its compensation, but is a serious injury to its substantive property rights in that the substitute remedy under that statute is not substantial and efficient within the requirement of *Crane v. Hahlo* at page 147 and *Hardware Dealers' Mutual Fire Insurance Co. v. Glidden* at page 159, Petitioner's Brief, pp. 34-35. That injury is not changed one iota by the District Court's reminder in the New Haven decision that "if" the reorganization proceedings are dismissed, the Indenture Trustee's lien becomes enforceable.

C

Subsection (c)(12) of Section 77, if held to be applicable to the services and expenses of the Indenture Trustee, would also be a violation of Section I of Article III of the Constitution of the United States.

In the event that Subsection (c)(12) is held to apply to compensation and expense of an indenture trustee with a contract claim and lien therefor against the mortgaged property, it is a violation of Section I of Article III of the United States Constitution.

Under Section I of Article III of the Constitution, the judicial power of the United States is vested exclusively in the Courts. Thus in matters involving private right the judicial power may not be delegated to bodies other than constitutional courts.

The adjudication of the amount of the contract claim and lien of an indenture trustee for its compensation and expenses is clearly a matter of private right and a judicial function which can be performed only by the courts. Functions traditionally performed only by courts are deemed within the judicial power of the United States. *Crowell v. Benson*, 285 U. S. 22 (1932), at page 51; *Murray v. Hoboken Land and Improvement Company*, 18 How. 272 (1855).

Furthermore, no standards whatsoever are set up in Section 77(c)(12) or Section 77(e)(2) for the determination of maxima by the Commission or for fixing reasonable value.

There is a clear distinction between indenture trustees and volunteers in Section 77 proceedings. Unlike the former, the latter are not under any preexisting duties and responsibilities and may limit the extent and nature of their services or may be willing to take their chances on Court allowances within a maximum to be fixed by the Commission. They have no contract claim and lien for compensation for their services. The amounts of their allowances and the method of determining the same can, of course, be fixed by Congress in the statute which creates their right thereto. Section 48 of the Bankruptcy Act and the cases of *Callaghan v. Reconstruction Finance Corporation*, 297 U. S. 464 (which did not involve any determination by an administrative body), *Calhoun v. Massie*, 253 U. S. 170, and *Margolin v. U. S.*, 269 U. S. 93 (Petitioner's Brief, p. 34), all fall within the latter category and are not relevant here.

Since Section 77(c)(12), if applicable, gives a body other than a constitutional court power to make a final decision as to maximum allowances for services and expenses covered by a pre-existing contract claim secured by a lien, as to which there is no right of court review and no prescribed standards, it is contrary to Section I of Article III of the Constitution.

The constitutionality of the statute should be upheld by holding that Section 77(c)(12) is not and was not intended to be applicable to an indenture trustee having a contract right and lien for compensation for its services and expenses in the execution of the trusts.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Dated: December 26, 1942.

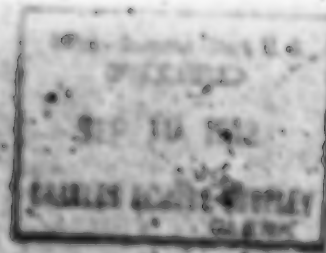
Respectfully submitted,

JESSE E. WAID,
14 Wall Street,
New York, N. Y.

WHITE & CASE,
Attorneys for Bankers Trust Company, as Corporate Trustee under the Refunding Mortgage, dated August 23, 1901 of The Kansas City, Fort Scott & Memphis Railway Company.

JOSEPH M. HARTFIELD,
FITZHUGH MCGREW,
HERBERT F. JULY,
Of Counsel.

FILE COPY



Nos. 387-388

In the Supreme Court of the United States

OCTOBER TERM, 1942

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

BANKERS TRUST COMPANY, TRUSTEE

**ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

**MEMORANDUM FOR THE INTERSTATE COMMERCE COM-
MISSION, AS AMICUS CURIAE**

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 387-388

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

BANKERS TRUST COMPANY, TRUSTEE

**ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

**MEMORANDUM FOR THE INTERSTATE COMMERCE COM-
MISSION, AS AMICUS CURIAE**

The Interstate Commerce Commission, as *amicus curiae*, urges this Court to grant the petition for writs of certiorari in this case. Its interest arises from the fact that under subsection (c) (12) of Section 77 of the Bankruptcy Act it is charged with the duty of fixing maximum limits of allowances to be paid out of the debtor's estate for the actual and reasonable expenses incurred by parties in interest in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures.

The Commission, by leave of the court below, filed brief and presented oral argument as *amicus curiae* in the appeals from the order of the District Court. The Commission also intervened in the case of *Matter of the New York, New Haven and Hartford Railroad Company, Debtor*, No. 16562, in the District Court of Connecticut, which resulted in an opinion by Judge Hincks directly contrary to the opinion of the Circuit Court of Appeals in this case (Appendix A to Petition for Certiorari)¹.

In view of the doubt created by the decision below when compared with the decision of the District Court for Connecticut, it is important to the efficient performance of the Commission's duties that the extent of its jurisdiction over claims of mortgage trustees for services and expenses in railroad reorganization under Section 77 be definitely established by decision of this Court.

Respectfully submitted.

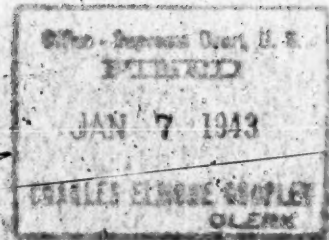
CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

SEPTEMBER 1942.

¹ Petitions for leave to appeal have been filed with the Circuit Court of Appeals for the Second Circuit.

FILE COPY



Nos. 387-388

In the Supreme Court of the United States

OCTOBER TERM, 1942

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

BANKERS TRUST COMPANY, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COM-
MISSION, AS AMICUS CURIAE, IN SUPPORT OF PETI-
TIONER

In the Supreme Court of the United States

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

MEMORANDUM FOR THE INTERSTATE COMMERCE COM- MISSION, AS AMICUS CURIAE, IN SUPPORT OF PETI- TIONER

The question of the applicability of section 77 (c) (12) of the Bankruptcy Act to claims for compensation and expenses of indenture trustees in reorganization proceedings is one which the Interstate Commerce Commission considers of extreme importance in the proper administration of these provisions. As has been pointed out in the petition for certiorari, these claims comprise a substantial portion of the total allowances in railroad reorganizations. To exempt them from the operation of subsection (c) (12) presents a serious handicap to the Commission in formulating and approving a plan of reorganization.

The Commission has consistently interpreted its powers to fix maximum limits as extending to such claims.¹ It has presented its views in a number of court proceedings wherein the issue has been raised, including the instant case.

The Commission adopts generally the brief and argument of Reconstruction Finance Corporation, petitioner. It desires, however, to state briefly its position with respect to several of the points therein as well as in the briefs, *amici curiae*, of the Trustees of the New York, New Haven and Hartford Railroad Company, of the Irving Trust Company, and of Frank C. Nicodemus, Jr.

I

The background, purpose, and legislative history of subsection (c) (12); as well as practical administration, require that all compensation for services rendered and reimbursement for expenses incurred in connection with the proceeding and plan be passed upon in the first instance by the Commission and that no one participating in the proceeding before the Commission shall receive reimbursement out of the debtor's estate for services or expenses except as the court may allow within maximum limits determined by the Commission.

The Commission, in exercising jurisdiction to fix maximum allowances for trustees under indentures, is following the plain language of the

¹ See petition for certiorari, pp. 10-11.

Act and its carefully drawn structure. Where the court, without prior action by the Commission, is charged with the task of making allowances, this authorization is explicitly provided in the statute. Thus the court, without Commission action, may set aside, as unreasonable, provisions for compensation in proxy or deposit agreements which were in force prior to August 27, 1935, the date from which the Commission was required to pass upon such agreements, including provisions therein for compensation. Section 77 (p). Also, the court may allow reasonable compensation to any Master designated to serve by the court and selected by it from a panel named by the circuit court of appeals. Section 77 (c) (13). Again, the court may order payment of reasonable administrative expenses and allowances incurred in any prior proceeding pending at the time the Section 77 proceedings begin. Section 77 (i). The reasons for vesting control over allowances in the court alone in these special circumstances are obvious. The careful enumeration of these exceptional instances makes even more pointed the express inclusion of allowances to indenture trustees in the comprehensive provisions of Section 77 (c) (12) vesting authority to fix maximum allowances in the Commission.

The statute does not attempt to classify applicants for compensation and expenses as "volunteers" or "nonvolunteers" as certain of the *amici*

curiae contend should be done.¹ Indenture trustees are, indeed, given a certain favored position as compared with most representatives of parties in interest, in that only indenture trustees, along with depositaries² and assistants specially employed by the Commission with the approval of the court, are entitled to reasonable compensation in addition to reasonable expenses. So much is provided in terms by Section 77. (c) (12). Any other differentiation in treatment, of a procedural nature, would require a rewriting of the statute.

II

The Commission contended in the court below that no lien on the mortgaged property accrues to the indenture trustee either contractually or at common law by virtue of its participation in the

¹ The brief of Frank C. Nicodemus, Jr., as *amicus curiae*, attempts to inject into this case the extraneous issue that the debtor being charged with affirmative duties under the act is exempt from the provisions of subsection (c) (12). Certainly if, as provided in section (c) (2) "trustees [of the debtor] and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable," it cannot be assumed that the statute gives the debtor and its counsel different and preferred treatment.

² Bankers Trust Company, respondent herein, has served not only as indenture trustee but also as depositary for the so-called Brewster Committee representing the bondholders, and in this latter capacity was allowed a maximum of \$10,000 for its services. 249 I. C. C. 195, 236. It had sought an allowance of \$12,000 (*id.*, p. 230). As depositary under a prior readjustment plan it had received \$6,454.44 as compensation and \$967.74 for disbursements (*id.*, p. 223).

organization proceedings. Its right to reimbursement arises solely out of the provisions of section 77 and is analogous to the right of equitable contribution. Compare *Trustees v. Greenough*, 105 U. S. 527. This contention is in accord with the holding in *New York, N. H. & H. R. Co. Reorganization*, 247 I. C. C. 677, 696, and *St. Louis-S. F. Ry. Co. Reorganization*, 249 I. C. C. 195.

III

The Commission submits that the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. sec. 41 (28) and 44; Judicial Code, sec. 207) is not available for review of Commission orders fixing maximum limits of compensation and expenses under subsection (c) (12).^{*} *Chicago & N. W. Ry. Co. v. United States et al.*, Dist. Ct. for Nor. Dist. of Ill. No. 2810, May 29, 1941, not reported. Compare also *Great Northern Ry. Co. v. United States*, 277 U. S. 172; *United States v. Griffin*, 303 U. S. 226, 235, 237. As shown in the last cited case, the rationale of the applicability of the Deficiencies Act is its applicability in fact. The Commission's orders under section 77 are not of a kind for which review under the Urgent Deficiencies Act is intended. The bankruptcy statute prescribes a complete procedure for review by the district court of the Commission's order approving

^{*} This point is raised in the brief *amicus curiae* in behalf of the Trustees of the New York, New Haven and Hartford Railroad.

a plan of reorganization, a type of review which differs from that under the Urgent Deficiencies Act. An order prescribing a plan would fall within the term "any order" equally with an order prescribing maximum allowances as well as other orders under the reorganization powers. It seems plain that such orders were not intended to be subject to review by a separate and distinctive procedure. In particular, the fixing of maximum allowances cannot have been intended to be reviewed by a special court of three judges, with appeal as of right to this Court. Cf. *Dickinson Co. v. Cogan*, 309 U. S. 382, 389.

IV

The Commission submits that the district court has no power to review or revise the findings of the Commission with respect to maximum limits under subsection (c) (12). Such findings present jurisdictional limits upon the district court comparable to the scale of compensation prescribed by section 48 of the Bankruptcy Act.

No valid constitutional objection can be raised to the procedure which the statute requires indenture trustees, along with other applicants for allowances, to pursue. The procedure is no different in substance from that which has long obtained with respect to claims for reparation brought by shippers against carriers to recover unreasonable or discriminatory charges. It is well settled that a shipper cannot "maintain his action for reparation in the absence of an order by the Interstate

Commerce Commission finding that the established schedule whereby the additional [charge] . . . per ton was exacted was unjustly discriminatory, determining what réparation should be made because of prior exactions thereunder, and directing the carrier to desist from such discrimination in the future, and to make the réparation indicated." *Robinson v. Baltimore & Ohio Railroad*, 222 U. S. 506, 508. This rule is applicable whether the shipper attempts to present the claim in a state or a federal court; and in view of the fixed doctrine that primary resort must be had to the Commission in matters involving issues of technical or administrative judgment, the rule cannot rest on any principle of election of remedies. *Louisville & Nashville Railroad Company v. Ohio Valley Tie Company*, 242 U. S. 288; *Standard Oil Company v. United States*, 283 U. S. 235; *Interstate Commerce Commission v. United States ex rel. Campbell*, 289 U. S. 385, 394; *Rockester Telephone Corp. v. United States*, 307 U. S. 125, 140, n. 23. Réparation claims, like those for allowances of fees, are claims by one private party against another; and they were grounded in a common law right.⁵ The fact that an indenture trustee has a

⁵ "The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, réparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts." *Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railway Company*, 284 U. S. 370, 384-385.

contract calling for reasonable compensation does not, of course, fetter the constitutional power of Congress as it otherwise exists and is evidently conceded to exist. "Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 308. The power in the present case may be rested both on the commerce clause, compare *Louisville & Nashville Railroad Company v. Mottley*, 219 U. S. 467; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, and on the bankruptcy clause, particularly since the issue relates to fees for services performed as an incident to the bankruptcy proceedings themselves.

CONCLUSION

The decree of the Circuit Court of Appeals should therefore be reversed.

Respectfully submitted.

CHARLES FAHY,

Solicitor General.

DANIEL W. KNOWLTON,

Chief Counsel,

DANIEL H. KUNKEL,

Attorney,

Interstate Commerce Commission.

JANUARY 1943.

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U.S. SUPREME COURT
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 387-388

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

BANKERS TRUST COMPANY,
Respondent.

BRIEF FOR AMICI CURIAE

FRED N. OLIVER
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OLIVER & DONNALLY,
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Of Counsel.

December 11, 1942.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

No. 387-388

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

BANKERS TRUST COMPANY,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE**

*To The Honorable The Chief Justice of the United States
and the Associate Justice of the Supreme Court of the
United States:*

The undersigned, members of the bar of this Court, respectfully pray leave to file the attached brief as *amici curiae* on behalf of The Mutual Savings Bank Group on New Haven Railroad Bonds. There have been filed with the Clerk of this Court the written consents of all parties who have entered appearances here in this case.

Respectfully submitted,

FRED N. OLIVER,
WILLARD P. SCOTT,
110 East 42nd Street,
New York, New York.

December 11, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 387-388

RECONSTRUCTION FINANCE CORPORATION,

Petitioner,

vs.

BANKERS TRUST COMPANY,

Respondent.

BRIEF FOR AMICI CURIAE

Statement

This brief deals with the question of whether compensation and allowances for mortgage trustees and their counsel for services rendered in railroad reorganizations under Section 77 of the Bankruptcy Laws, as amended (11 U. S. C. A. Sec. 205), are subject to the maximum limits fixed by the Interstate Commerce Commission as provided under Section 77(c)(12). It is filed on behalf of the Mutual Savings Bank Group on New Haven Railroad Bonds, which consists of approximately 225 mutual savings banks holding approximately \$39,000,000 principal amount

of bonds of the New York, New Haven and Hartford Railroad Company system, a railroad now in reorganization under Section 77. The question presented here was also raised in the New Haven reorganization by the same trust company that is the respondent in this case and has there been decided by Judge HINCKS adversely in its contentions *In The Matter of the New York, New Haven and Hartford Railroad Company*, No. 16562, District Court for the District of Connecticut, unreported opinion dated June 3, 1942 (see Appendix B). An appeal from that decision has been taken by Bankers Trust Company to the Circuit Court of Appeals for the Second Circuit and is now pending. The same question is also presented in one or more other pending reorganizations under Section 77. This brief is submitted because of the importance of this question to holders of bonds secured by mortgages upon the properties of railroads in reorganization under Section 77.

ARGUMENT

1. Section 77 requires that allowances made to mortgage trustees for services rendered in connection with the proceedings and plan of reorganization shall be within such limits as may be fixed by the Interstate Commerce Commission.

The broad question presented in this case is whether services by mortgage trustees rendered in connection with a proceeding and plan of reorganization under Section 77 of the Bankruptcy Laws, as amended, must be within the limits fixed by the Interstate Commerce Commission or whether mortgage trustees may obtain payment for their services out of the property subject to their lien without regard to such limitations.

The subject of the allowance of expenses and compensation in proceedings under Section 77 is governed by Section 77(c)(12), which provides in part as follows:

"Within such maximum limits as are fixed by the Commission, the judge . . . may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, . . ."

This provision is plain and unambiguous. It contemplates an allowance for the actual and reasonable expenses incurred, and reasonable compensation for services rendered, by trustees under indentures. No other provision is contained in the Act for the making of allowances with respect to such expenses and services. Moreover, this paragraph specifically provides that such an allowance shall be within the limits fixed by the Commission. There are no exceptions. The language is specific and all inclusive.

Furthermore, Section 77(e) provides that the Judge shall approve the plan only if satisfied that

"(2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge;"

The requirements of this clause reinforce those of subsection (c)(12). Not only are allowances limited by the

provisions of sub-section (c)(12) to such amounts as are encompassed within the maximum fixed by the Commission, but under the provisions of sub-section (e) the Judge may not approve the plan until he shall have been satisfied that amounts to be paid for expenses and fees incident to the reorganization are, among other things, within such maximum limits as are fixed by the Commission. Here again no exception is made. The language is plain and unambiguous and is all inclusive.

There seems to be little room for doubt as to either the purpose or the application of these provisions. However, if any doubt or ambiguity exists, reference to the Congressional history of Section 77 dispels such uncertainty. It is sufficient to observe that prior to the original enactment of Section 77 in 1933, the Commission had attempted, under its powers with respect to the issuance of securities under Section 20(a) of the Interstate Commerce Act and in recognition of the necessity for protecting insolvent railroads from exorbitant demands for fees and expenses, to exercise some measure of regulatory control over reorganization expenses, *Missouri-Kansas-Texas Reorganization*, 99 I. C. C. 330 (1925); *Chicago, Milwaukee, and St. Paul Reorganization*, 131 I. C. C. 673 (1928). However, this attempt on the part of the Commission was finally rendered ineffective as a result of the decision of this Court in *United States v. Chicago, Milwaukee and St. Paul Railroad*, 282 U. S. 311.

It is clear from the Congressional debates that the situation resulting from the decision of this Court in the St. Paul reorganization, was foremost in the minds of Congress. The purpose of Congress to this effect was clearly stated by Representative La Guardia (76 Cong. Rec., p. 5358):

"We have taken the views in the minority opinion in the *Chicago, Milwaukee & St. Paul Railroad* case, even to the extent that all incidental and indirect costs, expenses, and fees are subject to the control of the *Interstate Commerce Commission*, and have written that into the law." (Emphasis supplied.)

He pointed out (76 Cong. Rec., p. 2927) that the proposed Section 77 provided:

"complete supervision and control by the *Interstate Commerce Commission* of all expenses in connection with the reorganization of a railroad. . . . In this way we have carried out, I believe in every detail, the enlightened, sound, and constructive suggestions contained in the dissenting opinion of Mr. Justice STONE in the *Chicago, Milwaukee* case" (Emphasis supplied.)

In 1935 the provisions of Section 77 relating to the allowance of expenses and fees were amended to their present form. This amendment was discussed both in the House (79 Cong. R. 13307) and the Senate (79 Cong. Rec. 13765):

Nowhere have we found any suggestion, either in the House Committee hearings or in the debates in Congress, that allowances to mortgage trustees were to be an exception to the all-inclusive provisions of the Act delegating to the Commission authority to fix the maximum limits for allowances. On the contrary this history shows that the purpose of Congress was to invoke the informed judgment of a specialized tribunal in dealing with the problem and to entrust to it the initial task of fixing maximum limits for allowances, which, if otherwise uncontrolled, might constitute a serious drain upon the assets of a newly reorganized carrier.

The decisions dealing with this general problem are, with the exception of those below in the instant case, in

accord with the interpretation of the statute set forth above.

In *In Re Chicago and North Western Railway Company*, 35 F. Supp. 230 (D. C., N. D. Ill., 1940), the court said:

"The position of the trustee seems to be that a mortgage trustee and its counsel can, under a mortgage providing for reasonable compensation to the trustee and its counsel, render service of the character compensable under the statute aforesaid of a reasonable value in excess of 'the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan' and in excess of 'the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith' and that the court must cause such excess to be paid out of the mortgaged property. The court is satisfied that it has no power to make allowances for compensation for services compensable under the statute aforesaid in excess of the maximum allowances fixed by the Interstate Commerce Commission, whether such excess be payable out of the mortgaged property only or from other sources."

In *Matter of the New York, New Haven and Hartford Railroad Company*, *supra*, Judge HIXCKS overruled a similar contention of a mortgage trustee and concluded as follows:

"Just as Section 77 provides a technique of reorganization which does not require the enforcement of mortgage liens, so it contemplates by subdivision (c) (12) a technique for the liquidation and discharge of contractual claims for services which obviates the necessity of the foreclosure of the covering liens. And the fact that the services and expenses of these petitioners happen to be the subject-matter of contract liens no more excludes their allowance from the effect of (c) (12) than the existence of outstanding mortgages operates to immunize the bondholders

secured thereby from the other provisions of the Act which contemplate that their claims may be discharged by the substitution of securities of equivalent value under a plan which satisfies the requirements of the Act. The petitioners' contract provided that they should receive reasonable compensation and reimbursement. The same standard of liquidation is prescribed by Section 77. Only the method and the forum for accomplishing the liquidation is changed.

"The language of (c)(12) specifies a single method which shall apply to all parties alike. That Congress indeed intended that subdivision (c)(12) should apply to Indenture Trustees who might happen to have a lien, as well as to other parties in interest and committees who were without a lien, abundantly appears from the legislative history of the Act. There is thus no occasion for the modification of the inclusive language of (c)(12) by the process of construction."

II. A judicial construction of Section 77(c)(12) that would provide an exception for mortgage trustees would defeat the purpose of Congress.

The purpose of Congress was to provide "complete supervision and control by the Interstate Commerce Commission of all expenses in connection with the reorganization of a railroad" (76 Cong. Rec., p. 2927). A construction of Section 77(c)(12), which would make an exception with respect to mortgage trustees would not only seem to be contrary to the express language of that provision, but would, to that extent, defeat the purpose of Congress in bringing all expenses under the control of the Commission. That this is a matter of substantial practical consequence is apparent from a reference to any of the major proceed-

ings under Section 77¹ for a comparison of the aggregate amount of allowances requested by mortgage trustees with the aggregate amount requested by other parties.¹

Moreover, the absence of any such control would remove what might otherwise be an effective deterrant to overzealous or excessive activity in certain instances. The Circuit Court of Appeals for the Seventh Circuit in *In Re Chicago and North Western Railway Company*, 126 F. (2d) 351 (1942), said:

"Nor can we ignore the fact that the attack in this court has been waged largely by trustees named in Debtor's numerous mortgages. They assert a right to appeal and attack the plan although the great majority of the bondholders, for whom they assume to speak, are satisfied and opposed to their appeals. In fact, the trustees assert they are within their rights (and duties) to take these appeals even though all the bondholders of their particular mortgage are all satisfied with the reorganization and all oppose the taking of an appeal by the trustees. We think otherwise. This is hardly the place to discuss or decide the authority of the trustees to prosecute appeals, irrespective of their bondholders' wishes, however. The most liberal construction of powers of trustees to litigate and to take a position antagonistic to the views and wishes of the great majority (or all) of the bondholders and to load the disturbed and distracted creditors with large expenses, emphasizes our reasons for bringing the litigation to an end at the earliest possible date.

"One creditor, with a claim of less than one-fourth of one percent of debtor's total indebtedness is attempting to block and defeat the plan. And said

¹ These figures, tabulated for eight major reorganizations, are set forth in Appendix "C" to the petition of Reconstruction Finance Corporation for certiorari.

creditor is speaking through a trustee who is misrepresenting a majority of the holders of bonds for whom it speaks. And more, it asks compensation for itself and its counsel for performing this work."

It seems plain that it was the intent of Congress to guard against just such situations as this. Sub-section (c)(12) contains language appropriate to that end. Any construction of sub-section (c)(12) that would seriously impair its scope would unfortunately impede the efforts of Congress to improve the machinery of reorganization.

III. The arguments by which mortgage trustees seek to avoid application of Section 77(c)(12) are without substance.

In the courts below, and in other pending cases, mortgage trustees have sought to avoid the application of sub-section (c)(12) by a variety of arguments. We will consider some of these briefly.

1. It is sometimes contended, and was so contended in the courts below, that services rendered by mortgage trustees are not "in connection with the proceedings and plan" and, therefore, do not fall within the limits of sub-section (c)(12). The Circuit Court of Appeals evidently believed that the services here involved were rendered in connection with the proceedings and plan since it stated:

"Nor is the fact that the services of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. The officers of appellee and its counsel gave attention to the steps taken in the proceedings and attended hearings

before the court and the Commission. They took part in conferences in regard to the status of the proposed plan of reorganization and in meetings held to work out new plans" (Rec. 106).

Moreover it is evident from a review of the services described by Bankers Trust Company in its petition for allowances that such services rendered by it and its counsel were occasioned by, and directly in connection with, the proceedings and plan of reorganization and but for such proceedings would have never been required (Rec. 19-26, 35-59, 62-77). Without reviewing such services in detail, it seems indisputable that services in connection with court hearings and orders, Commission hearings on a plan, attendance at conferences in connection with such matters and research with respect to questions arising therefrom are services in connection with the proceedings and plan.

2. The basis of the decision of the Circuit Court of Appeals below seemingly is that Bankers Trust Company requested compensation, not under Section 77(c)(12), but under the terms of the mortgage, for services rendered on behalf of the bondholders, irrespective of any benefit to the estate (Rec. 106). Such an interpretation would lead to the result that application of the procedure prescribed by Congress would be dependent upon the election of a claimant and would substitute for a matter of substance a mere matter of form.

Moreover, the contention that services performed by a mortgage trustee are not for the benefit of the estate but solely for the benefit of bondholders and, therefore, of a character different from those contemplated by sub-section (c)(12), is merely an attempt to state the problem in such a way as to make the statute inapplicable. Nothing in sub-section (c)(12) prohibits the making of an allowance

for services which are primarily for the protection of a single class of security holders. Nor have the Commission and courts so construed this provision, inasmuch as allowances for mortgage trustees have been frequently made in accordance with those provisions. In fact there are relatively few instances in which a party participating in a reorganization purports to act for other than a restricted group of interests.

3. It is contended by mortgage trustees that, if subsection (c)(12) were held to be applicable to the services and expenses of a mortgage trustee, they would be deprived of the right to a judicial review in violation of the Fifth Amendment of the Constitution of the United States. This argument was effectively answered in Judge HINCKS' decision on the same question in *In the Matter of The New York, New Haven and Hartford Railroad Company, supra*, where he stated:

"The petitioners further complain that under the Act, as I have construed it, they are deprived of all right to judicial review of a decision by the Commission which seems to liquidate, at least in one dimension, their contractual right to compensation. This complaint is unfounded.

"For under subdivision (c)(2) the Judge may approve a plan only if 'satisfied' that all allowances 'for expenses and fees incident to the reorganization . . . are within such maximum limits as are fixed by the Commission' and are 'reasonable'. Thus the petitioners' liens can be extinguished through a discharge of their claims in these proceedings only if the maxima set by the Commission are such that the allowances made thereunder by the Judge are found by the Judge to be reasonable.

"And if the Judge shall not be satisfied that such maxima permit of allowances which are reasonable,

under the Act the Judge may return the petition for reconsideration by the Commission. Such is the view of the parties opposing petitions 492 and 611, including counsel for the Commission. The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as 'reasonable' although convinced that it was inadequate. Such a law would stultify both author and agent."

4. It is also contended by mortgage trustees that, if sub-section (c) (12) were construed to be applicable to their claims for an allowance, it would constitute an impairment of their substantive right to a lien under the terms of the indentures. This contention was also answered by Judge HINCKS in the same decision, in which he said:

"Nor is the Act, thus construed, unconstitutional.

"The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648. *Cf. Wright v. Union Central Life Ins. Co.*, 311 U. S. 273, at 279."

Moreover this argument confuses two separate and distinct functions (1) that of the Commission in determining the maximum limits of reasonable compensation and (2) that of the court in determining the existence and extent of a lien for compensation allowed. Congress may properly separate these functions. In doing this, it has empowered the Commission only to fix a maximum for compensation, not to disturb any liens. If a mortgage trustee has a lien, that lien will secure the payment of the allowance made by the court within such maximum. Further-

more, the measure of compensation under sub-section (c)(12) is "reasonable compensation" and is no different from that generally found in indentures.

An analogy is found in Section 77(e) where the determination of the value of any property for any purpose is entrusted to the Commission, although the court determines the extent of mortgage liens. In the present instance the Commission is given the power to fix maximum limits for the value of services, in the other to determine the value of property. Determination of the extent of a lien by the court involves problems relating to what property the lien attaches, the liens to which it is subordinate and related matters, and is a question wholly apart from the function performed by the Commission.

Conclusion

Section 77(c)(12) was designed by Congress as a safeguard against excessive allowances. It provides a uniform standard and a uniform procedure. Any exception to the application of that provision will impair, correspondingly, the efficacy of the protection afforded.

We ask that the decision below be reversed and that this Court plainly state the scope and effect of Section 77(c)(12) for the guidance of other courts in which the same question is pending.)

Respectfully submitted,

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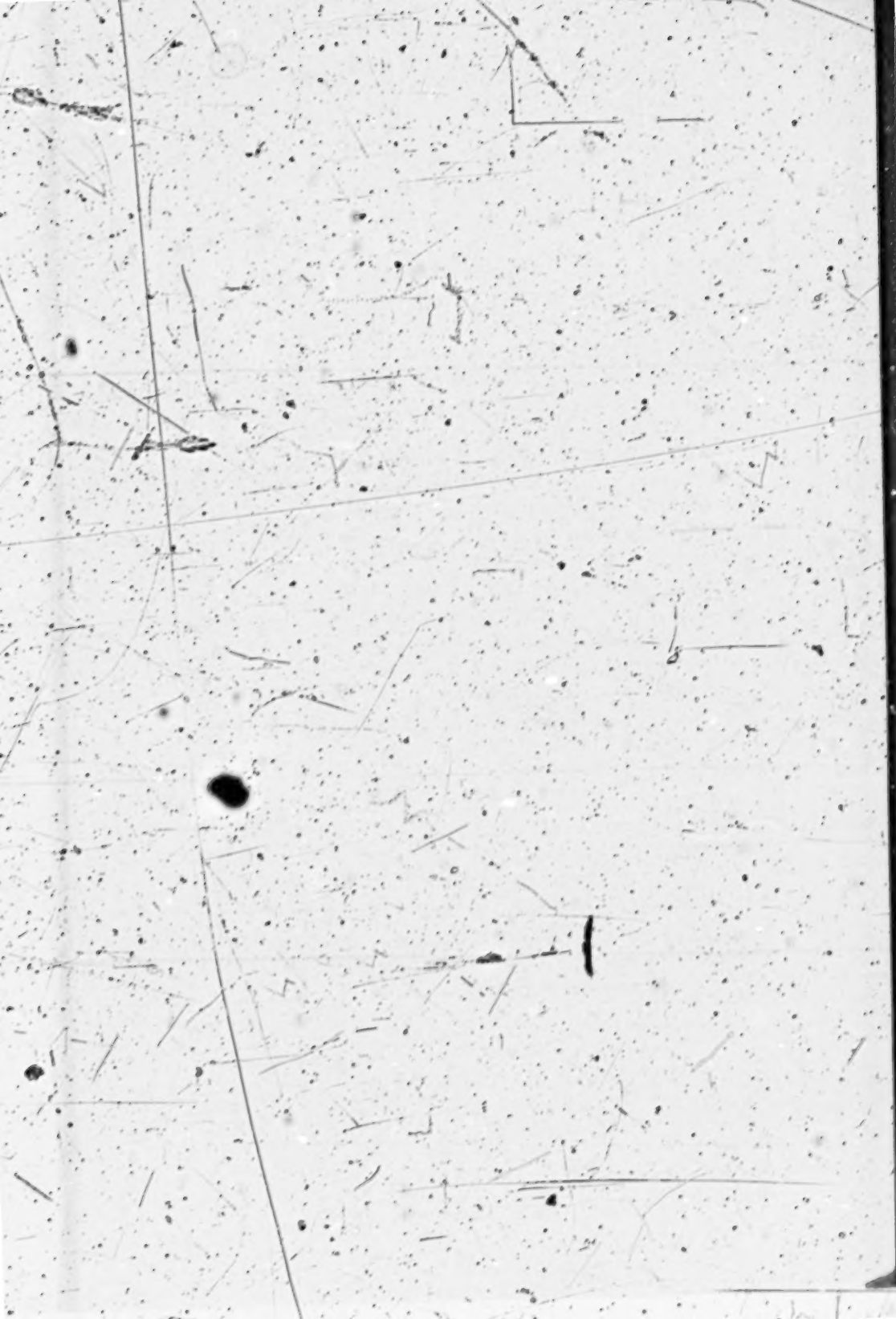
December 11, 1942.



Appendix A

Section 77(c)(12) provides as follows:

"(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceedings and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)."



Appendix B

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT**

**In Proceedings for the Reorganization
of a Railroad**

<p>IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, <i>Debtor.</i></p>	}	<p>No. 16562</p>
--	---	-------------------------

**MEMORANDUM OF DECISION
ON
MOTIONS TO DISMISS
PETITIONS FOR ORDERS 492 AND 611**

These petitions are brought each by an indenture trustee, No. 492 by Bankers Trust Company, as trustee under the First and Refunding Mortgage and No. 611 by Irving Trust Company as trustee under a Collateral Trust Indenture, asking the Court without reference to or restriction by any maximum allowances set by the Interstate Commerce Commission in these proceedings to adjudicate the amounts on account of the services and expenses of the respective petitioners and their counsel in these proceedings; to decree that the allowances thus established constitute under the provisions of the respective indentures

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prior liens in favor of the petitioners upon the respective mortgaged properties, or upon securities to be issued to the bondholders secured thereby; and to enforce said liens.

The matter is before the Court upon motions to dismiss these petitions filed and pressed by the Interstate Commerce Commission through its counsel, by the New Haven Trustees, and by Reconstruction Finance Corp., a collateral noteholder in these proceedings. The petitions have also been opposed by brief in behalf of the Mutual Savings Bank Group.

I.

I hold that the services rendered and expenses incurred by the petitioners and their attorneys are covered by the liens of the respective mortgage indentures, in so far as said services were reasonably necessary and adapted—(a) to protect and advance in these proceedings the interests of the underlying bondholders, (b) to advance the achievement of reorganization, and (c) to protect the mortgage trustee from personal liabilities for which under the mortgage it has a right of indemnity against the debtor's estate.

I cannot accept the view that the petitioners were acting as mere volunteers in the premises. They were acting at least in substantial part under the contract of the trust indenture whereby they were expressly entitled to "reasonable compensation" and to "reimbursement of reasonable expenses, including counsel fees" for all services rendered "in the execution of the trusts hereby created." The indenture was drawn long prior to the enactment of Section 77. It provided that in case of default the petitioner, as also bondholders, might enter upon and operate the mortgaged property for the benefit of all bondholders; also that the petitioner might foreclose the mortgage and obtain a receiver.

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I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. Certainly this equitable obligation was not precisely to be measured by their possible liability in an action at law for non-feasance. I find nothing in Section 77 which exonerates mortgage trustees from their equitable obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1933. See 15 U. S. C. A. 77bbb and 77000(c).

To be sure, the Bankruptcy Act substitutes statutory remedies for the remedies incident to an equity receivership, to the extent that the new remedies vary from the old the course of activity by a mortgage trustee and much of the incidental—but inescapable—detail requires adaptation to that change. But this change did not extinguish any rights or obligations growing out of the mortgage indenture nor transform the status of the petitioners from that of responsible trustees to that of volunteers. And the activities reasonably required for their own protection and for the protection of their bondholders under the exigencies of reorganization under Section 77, as indeed also services contributing to the achievement of reorganization, fell within the lien of the mortgage contracts. Cf. *Straus v. Baker Co.*, 87 Fed. (2nd) 401, at page 408.

I notice that the Commission has made a distinction between "regular and routine services performed in administering the trust, ordinarily covered by an annual maintenance fees" and other "special" services performed in the reorganization proceedings. This distinction seems to me entirely valid. Such routine services cannot constitute

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allowances in the reorganization proceedings and are not subject to the jurisdiction of the Commission, because they are not "incurred in connection with the proceedings and plan", as specified under subdivision (c)(12). Nevertheless, both the routine services and the services in the reorganization proceedings may be covered by the lien of the mortgage indenture.

II.

I hold that all compensable services and expenses of the petitioners which were incurred in connection with the proceedings and plan fall within the provisions of Section 77(c)(12).

Just as Section 77 provides a technique of reorganization which does not require the enforcement of mortgage liens, so it contemplates by subdivision (c)(12) a technique for the liquidation and discharge of contractual claims for services which obviates the necessity of the foreclosure of the covering liens. And the fact that the services and expenses of these petitioners happen to be the subject-matter of contract liens no more excludes their allowance from the effect of (c)(12) than the existence of outstanding mortgages operates to immunize the bondholders secured thereby from the other provisions of the Act which contemplate that their claims may be discharged by the substitution of securities of equivalent value under a plan which satisfies the requirements of the Act. The petitioners' contract provided that they should receive reasonable compensation and reimbursement. The same standard of liquidation is prescribed by Section 77. Only the method and the forum for accomplishing the liquidation is changed.

The language of (c)(12) specifies a single method which shall apply to all parties alike. That Congress indeed

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intended that subdivision (c)(12) should apply to Indenture Trustees who might happen to have a lien, as well as to other parties in interest and committees who were without a lien, abundantly appears from the legislative history of the Act. There is thus no occasion for the modification of the inclusive language of (c)(12) by the process of construction.

And certainly the construction advanced by the petitioners is inadmissible. They point to the language of (c)(12) under which the court may order the allowances thereby authorized to be paid "out of the debtor's estate". I agree that this language is broad enough to authorize in a proper case payment from the free (unmortgaged) assets of the estate. In this respect, perhaps the Act goes further than the equitable rule whereby allowances for services in behalf of mortgaged property might be charged against the mortgaged assets. But I cannot agree that the scope of (c)(12) is limited to such allowances as may only be charged against the general (unmortgaged) estate. The language used, viz., "the debtor's estate", is broad enough to include the mortgaged assets as well as the free assets. And if the *enforcement* provisions of (c)(12) are entitled to this broad construction, as I hold, there is no room left for the argument that the *liquidation* provisions of (c)(12) with the accompanying grant of jurisdiction to the Commission must by a narrower process of construction be confined to services not covered by lien.

III.

Nor is the Act, thus construed, unconstitutional.

The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall

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be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648. *Cf. Wright v. Union Central Life Ins. Co.*, 311 U. S. 273, at 279.

The petitioners further complain that under the Act, as I have construed it, they are deprived of all right to judicial review of a decision by the Commission which seems to liquidate, at least in one dimension, their contractual right to compensation. This complaint is unfounded.

For under subdivision (e)(2) the Judge may approve a plan only if "satisfied" that all allowances "for expenses and fees incident to the reorganization * * * are within such maximum limits as are fixed by the Commission" and are "reasonable". Thus the petitioners' liens can be extinguished through a discharge of their claims in these proceedings only if the maxima set by the Commission are such that the allowances made thereunder by the Judge are found by the Judge to be reasonable.

And if the Judge shall not be satisfied that such maxima permit of allowances which are reasonable, under the Act the Judge may return the petition for reconsideration by the Commission. Such is the view of the parties opposing petitions 492 and 611, including counsel for the Commission. The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as "reasonable" although convinced that it was inadequate. Such a law would stultify both author and agent. Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible creditor and class participation in reorganizations. This policy, in a sense, is paramount to the policy of economy in administration;

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were it otherwise the Act would have prohibited all allowance of compensation to the parties from the estate. But plainly Congress did not want costless reorganizations rather than just reorganizations. It follows that the true policy relating to economy is one adapted to preclude excessive expense, —not to enforce inadequate compensation. Thus understood, the policy collides not at all with that of encouraging useful and responsible creditor representation by the allowance of adequate compensation through which that objective can be achieved.

This view is also completely in harmony with the underlying scheme of the Act. For the Act charges the Commission with the responsibility of determining values and of formulating plans. Yet the plans thus reported can be approved by the Judge only if he is satisfied that they are fair; if not thus satisfied, unless he dismisses the proceedings, he can only return the plan to the Commission for further consideration. And so as to a maximum allowance set by the Commission. The Judge can approve the plan only if satisfied that all allowances are within the maxima set by the Commission *and are reasonable*; failing that, he can only dismiss the proceedings or "refer the proceedings back to the Commission for further action" (subdivision (e), second paragraph). Surely under this provision if the Judge's disapproval were limited to the maxima set by the Commission upon specified petitions for allowances, he need not refer back the substantial provisions of a reported plan: a re-reference of those specified petitions would suffice, accompanied by his "opinion stating his conclusions and the reasons therefor."

To be sure, this seems a cumbersome procedure for the liquidation of an allowance. Indeed, theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a re-

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organization. Yet from a practical standpoint, as Congress apparently perceived, in almost every case in which reorganization is indeed feasible a considered exchange of views between the Commission and the Judge will result in a final agreement purged of inadvertence and extravagance which shall permit of a fair appraisal of services under the particular eye of the Commission and services relating principally to activities before the Judge. Anyhow, Congress deemed it wise to condition the privilege of reorganization upon such an agreement. And if ever a case shall arise resulting in a final deadlock instead of agreement, perhaps the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission. However that may be, the petitioners here cannot justly complain that their rights have been insulated from judicial review when judicial sanction is required for the liquidation and discharge of their claims in the bankruptcy proceedings and in the event that the bankruptcy proceedings are dismissed their claims and covering liens are left unimpaired for adjudication elsewhere.

Thus any question as to the validity of an exclusive grant of jurisdiction to the Commission to fix, or even limit, allowances is not involved under the Act. And there is no basis for the constitutional objection which the petitioners invoke.

On these conclusions, the motions to dismiss petitions 492 and 611 must be granted. For these petitions are neither appropriate nor necessary to raise in issue in these proceedings the reasonableness of the maxima allowed by the Commission. That issue was available to the petitioners at the hearing in this court upon their applications for allowances after the Commission had set maxima under Section 77(c)(12). On that record, without any further

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expansion, it lay within the power of this Court in these proceedings either to order allowances within the limits of the maxima or to return the applications to the Commission for further action on the ground that the maxima did not permit of adequate compensation.

Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the lien are suspended during these proceedings: they may be enforced only if these proceedings are dismissed.

An appropriate order may be submitted.

Dated at New Haven this 3rd day of June, 1942.

C. C. HINCKS,
United States District Judge.

FILE COPY

DEC 15 1942

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 387-388

RECONSTRUCTION FINANCE CORPORATION,

Petitioner,

vs.

BANKERS TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF OF AMICUS CURIAE IN BEHALF OF HOWARD
S. PALMER, JAMES LEE LOOMIS AND HENRY B.
SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW
YORK, NEW HAVEN AND HARTFORD RAILROAD COM-
PANY, DEBTOR.**

HERMON J. WELLS,

*Amicus Curiae in behalf of Howard
S. Palmer, James Lee Loomis and
Henry B. Sawyer, Trustees of the
property of The New York, New
Haven and Hartford Railroad Com-
pany, Debtor.*

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SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW
YORK, NEW HAVEN AND HARTFORD RAILROAD COM-
PANY, DEBTOR.**

Statement.

This brief deals with the question whether or not allowances for services and expenses of a mortgage trustee rendered and incurred in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, are subject to maximum limits fixed by the Interstate Commerce Commission as required by Section 77(c)(12)* of that Act. It is filed in behalf of

* 11 U. S. C. A., Sec. 205(c)(12).

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, in proceedings for the reorganization of that company, under Section 77. Said Trustees have an interest in this question because in the New Haven proceedings it has been decided adversely to the respondent here (*In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor, No. 16562, United States District Court for the District of Connecticut*,—an unreported opinion, dated June 3, 1942, and printed in the Petition as "Appendix A"), and an appeal by respondent from that decision is now pending before the Circuit Court of Appeals for the Second Circuit.

To avoid duplication, the present brief will be limited to a discussion of two constitutional aspects of the aforesaid question.

Argument.

There is no conflict between Section 77(c)(12) and the provisions of the Mortgage Indenture with respect to services and expenses of respondent.

In the Court below respondent claimed that its right to a lien on the mortgaged property for compensation and expenses would be impaired if Section 77(c)(12) were applicable to the services and expenses listed in its petition numbered 266 (R., p. 14 *et seq.*). We believe that respondent's whole argument on this point must fail for the simple reason that Section 77(c)(12) gives respondent exactly what the mortgage purports to give it—the right to payment of a reasonable sum for expenses and services. This can best be demonstrated by quoting, with appropriate emphasis, from the provisions of the Act and the mortgage.

Section 77(c)(12) says:

"Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, * * * for the *actual and reasonable expenses* incurred in connection with the proceedings and plan and *reasonable compensation for services* in connection therewith by trustees under indentures."

In a similar vein the mortgage provides that (Article Twenty-third, R., p. 17, par. 5):

"The Trustees shall be entitled to *reasonable compensation for all services* rendered by them in the execution of the trusts hereby created, which compensation as well as all *reasonable expenses* necessarily incurred and *actually* disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

It seems clear that if Section 77 had failed to cover in any way the matter of allowances for expenses and services, and if respondent had proceeded under its mortgage to recover on account of the expenses and services listed in its petition, it could have received through its contract lien only "reasonable compensation for * * * services" and reimbursement of "reasonable expenses", for that is the language of the indenture.* The statutory standard for computing the amount of respondent's allowance is precisely the same. It says that respondent may receive in a proper case reimbursement for "reason-

* For present purposes it seems unnecessary to go as far as the Commission went in claiming before the Court below that as a matter of *intention* the mortgage contract covered only so-called "routine" services and expenses, and not the services and expenses in issue here. Indeed we think that the language of the mortgage will not stand the strain thus put upon it and prefer to rest our argument on the fact that the mortgage and the statute establish the same legal standard in this case.

able expenses" and "reasonable compensation for services" (Section 77(c)(12)). And both the statute and the mortgage are equally well calculated to assure payment—the mortgage through the device of a lien ahead of bondholders, and the statute through the provision for payment in cash. Under such circumstances there can be no impairment of respondent's contractual lien (*Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 530 [1941]),* and respondent's argument to the contrary seems to us to present this Court merely with a tempest in a teapot. Furthermore, if the Commission's maxima are below the "reasonable" sums required by the statute (and most mortgage indentures), the fault does not lie in the statutory standard but in the application of that standard by the Commission. The remedy in case of such an error would be to procure a review of the Commission's order,—not to launch an attack on the standard itself as respondent has done here.

Nor is there any conflict between the statute and the mortgage in the matter of procedure. The mortgage does not say who shall apply the standard of reasonableness and ascertain the amount that is due respondent for its services and expenses. Thus the parties left the selection of a forum to applicable law. That law (Section 77(c)(12)) selects the Commission as the body to apply the standard in fixing maximum limits, and it goes on to provide that the court may make reasonable allowances within those limits. Here, again, there is no inconsistency. The statute merely carries on where the mortgage is silent.

Thus, this case does not raise any question of the power of Congress through the Commerce and Bankruptcy

* This Court there said:

"If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid."

clauses* to regulate the provisions of an indenture that seeks to give a lien for more than is reasonable on account of a trustee's services and expenses that may be rendered or incurred in the course of a railroad reorganization. But if such an issue were present, respondent could draw no comfort from *Security Mortgage Co. v. Powers*, 278 U. S. 149, 456, because Section 77(c)(12) would prevent the "contingent liability" of the Debtor from ever becoming effective for more than a reasonable amount (*Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 480 *et seq.*; *Norman & Baltimore & Ohio R. Co.*, 294 U. S. 240, 307-310; *Continental Illinois Bank and Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 680). And if there were any conflict between the mortgage and the federal law, that law would operate no more drastically upon the obligation of the mortgagor than did the state law in *Butzel v. Webster Apartments Co.*, 112 F. 2d 362, 368, 6 Cir., 1940, and *In re McCrory Stores Corp.*, 91 F. 2d 947, 949, 950, 2 Cir., 1937.

Either Section 77(c)(12) and (e), or the Urgent Deficiencies Act, or both, grant adequate judicial review of maxima fixed by order of the Commission under Section 77(c)(12).

In the Court below petitioner and certain other parties took the position that subsection (e), together with the appellate provisions of subsection (c)(12) of the Act [11 U. S. C. A., Sec. 205(e) and (c)(12)] provide a method that is constitutionally adequate for judicial review of the Commission's order fixing maximum limits within

* Many of the provisions of Section 77 of the Bankruptcy Act are clearly traceable to power of Congress to regulate interstate commerce. These provisions include those relating to allowances, which if necessary could be supported by that power alone. See *United States v. Chicago, Milwaukee, St. P. & P. R. Co.*, 282 U. S. 311 (the \$2.50 deposit).

which the court may make allowances.* On the other hand, respondent asserted a violation of the Fifth Amendment because of a claimed failure on the part of Congress to establish in Section 77 itself any means whereby the Commission's determination of a maximum might be reviewed, even if such maximum should be fixed so low as to be arbitrary or confiscatory. We think that respondent is wrong on this issue and that petitioner and the District Court in Connecticut (Petition, pp. 20, 21) are right when they say that in practice, and within the limits of judicial review of administrative action, Section 77 makes it possible for courts of bankruptcy to bring about any necessary upward revision of the Commission's maxima. But no useful purpose here would be served by duplicating the arguments of others on this point. Instead we shall confine ourselves to showing that respondent's position is untenable because another method of review is available if, as respondent claims, no review may be had within the framework of Section 77 itself.

* Section 77 (e) states, in part, that:

"The judge shall approve the plan if satisfied that . . .
 (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, *are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge.* . . . If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest *refer the proceedings back to the Commission for further action, in which event he transmit to the Commission a copy of any evidence received*" (italics supplied);

and Section 77(e)(12) provides as to appeals that:

"Appeals from orders of the court fixing such allowances [under Sec. 77(e)(12)] may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily."

The statutory scheme for review under Section 77 is either appropriate to cause a necessary revision of the Commission's maxima or it is not appropriate for that purpose. If it is appropriate that ends the matter. If it is not (and this is our assumption for present purposes only) then review may be had under the Urgent Deficiencies Act of October 23, 1913 (28 U. S. C. A., Sections 41 (28) and 44; see Judicial Code, Section 207), which makes special provision for review of orders of the Commission.* The Fifth Amendment does not require Congress to provide specifically in the Bankruptcy Act for review of the Commission's orders on allowances if provision therefor is made elsewhere. Indeed this was settled long ago, in principle, by *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 485, 486, where this Court answered with respect to Section 15a of the Interstate Commerce Act the very argument that respondent is now making. Mr. Justice Brandeis there said:

"It is further objected that no opportunity is given under Section 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed

* 28 U. S. C. A., Section 41 (28) states that:

"The district courts shall have original jurisdiction as follows: * * *

"Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219);

and 28 U. S. C. A., Section 44 provides, in part, that:

"The procedure in the district courts * * * in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under Sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States" (Oct. 22, 1913, c. 32, 38 Stat. 220).

in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under Sections 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co. v. Ben Aron*, 253 U. S. 287, 64 L. ed. 908, P. U. R. 1920E, 814, 40 Sup. Ct. Rep. 327."

Accordingly, for present purposes it is entirely unnecessary to decide which of the opposing parties are correct in their view concerning the adequacy of the appellate provisions of Section 77. It is enough to know that if the Commission should limit so low a maximum as to give rise to an issue of confiscation, or if it should err in matters of law in the course of limiting a maximum, any party aggrieved thereby will be entitled to have the determination reviewed either (1) under Section 77 if such review is there provided for or (2) under the Judicial Code relating to review of orders of the Commission if no other special provision ~~therefor~~ is found in Section 77. After all, in order to dispose of respondent's claims under this head, this Court need not determine *which* method a litigant should follow if it seems clear that *some* method is available.* The familiar method pro-

* In *In re Chicago & N. W. Ry. Co.*, 7 Cir., 121 F. 2d 791, 798, note 2, the Court said:

"The method of review presents a question not necessary for us to decide, which is, How shall such an order by the I. C. C. be reviewed? By the court as in case of a review of an order made by a master? Or by an independent suit in any court of competent jurisdiction? That I. C. C. actions are reviewable seems to us quite clear, but where and how is a more difficult question, which is passed because not directly involved in this appeal."

vided by the Urgent Deficiencies Act may indeed be somewhat limited in scope (*Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, 160), but it is constitutionally adequate, and it is available if respondent is right in its claim that no means of review is open under Section 77.* In fact, the orders of the Commission on fees and expenses in the Milwaukee receivership were reviewed in this way (*U. S. v. Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311, 323, 328).

CONCLUSION.

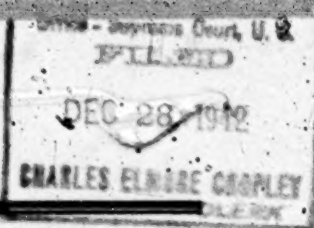
The decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court for further proceedings in conformity with the statute.

Respectfully submitted,

HERMON J. WELLS,

*Amicus Curiae in behalf of Howard
S. Palmer, James Lee Loomis and
Henry B. Sawyer, Trustees of the
property of The New York, New
Haven and Hartford Railroad Com-
pany, Debtor.*

* In *Chicago & N. W. Ry. Co. v. U. S. and I. C. C.* (Civil Action No. 2810, D. C. N. D., Ill., May 29, 1941—not officially reported) a statutory three-judge court under the Urgent Deficiencies Act refused to grant relief from an order of the Commission denying an allowance under Section 77(c)(12), but the decision would have been different had the court concluded that Section 77 failed adequately to cover the right to a judicial hearing.



Nos. 387-388

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

v.

BANKERS TRUST COMPANY, Trustee,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**AMICUS CURIAE BRIEF OF IRVING TRUST
COMPANY**

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Dated, December 26, 1942.

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BANKERS TRUST COMPANY, Trustee,
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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
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AMICUS CURIAE BRIEF OF IRVING TRUST COMPANY

Irving Trust Company is the trustee under various railroad mortgages; and its position in pending reorganizations under Section 77 of the Bankruptcy Act will be strongly affected by the decision of this Court.

It is a party to the *New York, New Haven & Hartford Railroad Company reorganization* case—in which was rendered the decision of Judge Hincks in the United States District Court for the District of Connecticut, a copy of which decision is annexed as Appendix B to the petitioner's brief herein. This decision—which is important in the consideration of the present case—related to two

parallel compensation petitions, one of which was filed by Bankers Trust Company as Trustee, and the other of which was filed by Irving Trust Company as Trustee.

In common with other indenture trustees, it has been affected adversely and unfairly (as it believes) by the fact that, although its duties have required it to participate actively in extended railroad reorganizations and to use its best efforts to protect its bondholders, its compensation (including that of its counsel) has been consistently minimized, after the completion of such services, by the holdings of the Interstate Commerce Commission and of lower courts to the effect that, regardless of the extent of the services performed *for its bondholders*, compensation cannot be allowed beyond the amount of the benefit contributed by such services *to the estate of the debtor* or, as otherwise stated, benefit to the reorganization.

POINT I

Indenture trustees are not mere volunteers in Section 77 proceedings. They are charged, after default, with active duties to protect their bondholders; and their services are performed primarily for their bondholders, not for the benefit of the debtor's estate.

Preceding the compensation report of the Commission (247 I.C.C. 677) in the *New York, New Haven & Hartford Railroad Company* case—which report is discussed in the above-mentioned decision of Judge Hincks—three indenture trustees had requested the Commission to clarify the basis upon which it fixes compensation to indenture trustees in Section 77 cases. In response to this request, the Commission, in its said compensation report, stated

in substance (247 I.C.C., at 696) that it regards indenture trustees as mere volunteers in a Section 77 proceeding; also that it does not fix compensation of indenture trustees "on the basis of the indenture contracts"; and that such volunteer services, not being required by the indentures, are not to be paid for as if so required. These statements are very illuminating because they demonstrate that the Commission, in fixing maximum limits, has acted upon a misconception of the duties of such trustees. In said decision of Judge Hincks, he disagreed with this fundamental theory of the Commission and correctly stated that an indenture trustee, far from being a mere volunteer in Section 77 cases, is charged with the active duty of protecting the bondholders. Until the decisions of the courts below in the present case, the situation has been that indenture trustees—believing it to be their duty to attempt to obtain proper relative treatment for, and otherwise to protect, their bondholders in Section 77 cases and having actively participated therein (often where there was no other representative of their bondholders)—have been told by the Commission and by the courts that they cannot recover for their services, except to the limited extent that they may have benefited the debtor's estate.

A similar misconception of trustees' obligations is shown by the brief of Reconstruction Finance Corporation herein, wherein it states (at p. 28), in effect, that if an indenture trustee does not wish to have its compensation limited by the Commission's standards, the trustee has "an unfettered option to resign its trust". This may be true, legally speaking; but it is certainly not the understanding which indenture trustees have of their obligations. They have accepted numerous trusts under which they undertook the duty to use their best efforts to protect

their bondholders after default. Conscientious trustees do not believe that, having accepted such trusts, they have an "unfettered" option to resign, when their services are most needed, if not assured of the reasonable compensation provided for in their indentures.

By the same contracts under which trustees accept their duties it is provided that they shall receive reasonable compensation. While the language of the indenture provisions varies somewhat, the indenture to Bankers Trust Company, as Trustee, in the present case is quite typical in stating that such compensation is to be paid for "all services rendered . . . in the execution of the trusts hereby created". Such compensation, as is stated in the brief of Bankers Trust Company, is secured by a prior lien upon the trust estate—whether by the specific provisions of the indenture or by well-settled law. While the obligations of the trustees continue and are increased by Section 77 proceedings, it is proposed by the petitioner and those supporting its position herein that the coordinate portion of the contract providing reasonable compensation for the performance of such obligations be ignored.

POINT II

The courts have power to fix allowances payable out of the mortgaged assets, to mortgage trustees under their indenture contracts, independent of the limitations contained in Section 77(c)(12) of the Bankruptcy Act. The Congress did not intend otherwise.

We desire not to duplicate the arguments contained in the respondent's brief. As later stated, in Point III, one purpose of the present brief is to supplement the respondent's brief and to request that this Court's decision shall cover the important general question raised by said Point III. Also, we wish to state, in a somewhat different way, a portion of the argument contained in the respondent's brief.

Section 77(c)(12) might have been interpreted in either of two ways: *first*, as meaning that in fixing allowances under that section the Interstate Commerce Commission should adopt the same standard* of "reasonable compensation" as has been applied by the courts for many years; or, *second*, as meaning that a new and different standard of "reasonable compensation" was created by that section.

If the first of such interpretations had been adopted, the position of petitioner herein would be substantially stronger, in our opinion, than it is. It is probably true that, even under such an interpretation, the exclusion of the courts from passing upon compensation, except within the maximum limits fixed by the Commission, is constitutionally objectionable; but this subject is fully dealt with by respondent's brief. We assume (passing by the constitutional questions) that there is force in an argu-

* By the word "standard," as used in this brief, we mean the elements to be considered in arriving at compensation.

ment that, if the standard of "reasonable compensation" were the same, the rights of trustees would not be violated if the Commission, rather than the courts, were to apply such standard in Section 77 cases. However, as interpreted by the courts and by the Commission, Section 77 created an entirely different standard of "reasonable compensation". The standard thus created was much narrower than the usual standard of such compensation under a mortgage, in that (a) the standard of such compensation under a mortgage is based upon the services rendered for the bondholders and the other elements stated in *In re Osafsky*, 50 Fed. (2d) 925 (D. C. S. D. N. Y.), while (b) the primary standard to be followed, and which has been followed, by the Commission in Section 77 cases is benefit to the estate of the debtor or, as otherwise stated, to the reorganization. The standard followed by the Commission accords with numerous decisions of the courts in cases construing the identical provisions of former Section 77B and also with the decisions in *Abrams v. Scandrett*, 121 Fed. (2d) 371 (C.C.A. 7) and *Hugg v. Crooks*, 122 Fed. (2d) 366 (C.C.A. 8) construing the provisions of Section 77(e)(12) (although the decisions did not specifically relate to indenture trustees).

The distinction made in the Section 77B cases, as between benefit to the estate of the debtor on the one hand and services for a particular creditor on the other hand, is emphasized by those cases which hold that an allowance of compensation out of the debtor's estate, based on benefit to the estate, does not prevent recovery of the balance of the reasonable value of compensation from the parties for whom the applicant was acting:

In re Davison Chemical Co., 14 F. Supp. 820, 833 (S.D.N.Y.);

Silver v. Scullin Steel Co., 98 F. (2d) 503, 508 (C.C.A. 8th);

Straus v. Baker Co., 87 F. (2d) 401 (C.C.A. 5th);

In re Prudence Bonds Corporation, 122 F. (2d) 258, 265 (C.C.A. 2nd);

In re Buildings Development Co., 98 F. (2d) 841, 843-44 (C.C.A. 7th);

Teasdale v. Sefton Nat. Fibre Can Co., 85 F. (2d) 379, 382 (C.C.A. 8th);

In re Paramount-Public Corp., 12 F. Supp. 823, 828 (S.D.N.Y.).

In fact, as is mentioned above, the Commission, in the *New York, New Haven & Hartford* case, has specifically stated that in fixing compensation under Section 77(c)(12), it does not base such compensation upon the indenture contracts.

In his above-mentioned decision in the *New York, New Haven & Hartford* case, Judge Hinecks was clearly in error—unless the many contrary decisions are erroneous—in stating (p. 62 of R.F.C. brief) that “reasonable compensation” under indenture contracts is to be based upon the same standard as “reasonable compensation” under Section 77. This is true also of the argument contained in the *amicus curiae* brief herein in behalf of the reorganization trustees of the *New York, New Haven & Hartford*, wherein it is stated (at p. 4) that “reasonable compensation” is intended to be the same in both cases. Such an argument is based upon the fact that the same words are used in both cases, and ignores the many court and Commission decisions interpreting such words as found in Section 77(c)(12) in a manner which is entirely different from the interpretation given by the courts in cases other

than Section 77 (and Section 77B) cases. The last-mentioned brief suggests that the fault lies, not in the statutory standard but in the application of that standard by the Commission. A change at this late date in the Commission's standard—even if such a change were justified—could not correct the injustice which has been done in the many cases already acted upon by the Commission.

Furthermore, we believe that such a change would not be justified. We think that the Commission has been compelled to follow the narrower standard, in view of the fact that the courts have not indicated that compensation allowed by the Commission, under Section 77, to indenture trustees (for other than ordinary routine services) is to be based upon a broader basis than benefit to the debtor's estate. Also, we believe that there is a logical reason for basing "reasonable compensation" allowed by the Commission by virtue of Section 77 (as distinguished from "reasonable compensation" under the indenture contracts) upon benefit to the debtor's estate—because that section provides for compensation not only out of the mortgaged assets, but also out of the un-mortgaged assets of the debtor. For example, the trustee under a debenture agreement, for which there is no pledged security, may be allowed compensation out of the estate. Such a trustee, or a trustee under a mortgage covering property of no value, would have no remedy except to make application under Section 77 for payment out of general assets—in which case, of course, benefit to the estate would have to be shown (and the Commissioner's maximum limits would be exclusive). In other words, the power to allow compensation upon the broader standard applicable to indenture contracts rests in the courts and not in the Com-

mission; and the court below correctly so held in the present case.

The result of the argument, if sustained, which is made by Reconstruction Finance Corporation and such *amici curiae* as support its position would be that in various cases a trustee under a mortgage covering ample assets, and which had rendered services entirely for the benefit of the bondholders and not at all for the benefit of the debtor's estate, would be completely deprived of compensation, although it accepted the trust and performed its duties to the best of its abilities under an indenture contract specifically providing for reasonable compensation for its services; and in spite of the fact that Section 77(f) requires that all liens (including those of the trustees) be satisfied upon consummation of a reorganization plan dealing with the bonds secured by such mortgages.

It certainly cannot be said that the awarding of compensation under the narrowly limited standard adopted under Section 77 takes the place of compensation upon the different and broader basis to which the trustee is entitled under its indenture contract. Therefore, there should not be imputed to the Congress the intention to preclude trustees from proper compensation under their contracts for all of their services in the execution of their trusts. Unless such intention is to be imputed, it must have been intended by Section 77 that the courts retain their power to do equity in such cases.

POINT III

The courts have power to charge reasonable compensation under the indenture contract against the new reorganization securities (or cash) receivable by the bondholders; and, such being the case, there is no good reason why trustees should not be compensated out of mortgaged assets constituting the security for the bondholders. This Court should hold that Section 77 was not intended to prevent trustees from receiving such reasonable compensation out of the mortgaged property; but, if this Court shall not so hold, it should hold that such compensation should be paid out of such new securities (or cash) to the extent that the lower courts shall determine.

In our opinion, there can be no possible answer to the argument that the restrictions imposed by Section 77 apply only to compensation payable "out of the debtor's estate" (Section 77(c)(12)) or "by the debtor, or by any corporation or corporations acquiring the debtor's assets" (Section 77(e)); and that compensation out of the new reorganization securities (or cash) going to the bondholders is not thus payable and therefore is not subject to the restrictions in question. There is no provision in Section 77 restricting compensation except when payable from the sources just mentioned.

The argument of petitioner is that the Congress took away any rights under indentures against the mortgaged security in excess of maximum limits restricted by the benefit to the general estate—although the services were rendered primarily for the protection of the bondholders. Even if (which, of course, we dispute) such arguments

were sound and it could be said that the Congress intended to pass so unreasonable a statute, and that such a statute is constitutional, these arguments cannot possibly affect the right of indenture trustees to the continuance of their lien against the proceeds of the mortgaged or pledged property, distributable to their bondholders. Payment therefrom does not differ in principle from payment by a client. The Section 77B cases above cited clearly hold that, so far as the full compensation claimed is not allowed out of the estate of the debtor, the remedy is against the client.

The only restrictions upon the sources from which compensation can be paid in Section 77 cases are those above mentioned. On the other hand, the equity powers of the court are preserved by the provision in Section 77(a) that, upon the entry of an order approving the reorganization petition

"the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Except to the extent that powers are specifically conferred by Section 77 upon the Commission, the equity jurisdiction of the court continues and is exclusive.

Matter of Chicago and Northwestern Ry Co., 121
Fed. (2d) 791 (C.C.A. 7), at 800.

A court of equity certainly has the power and the duty to enforce the trustee's lien against the proceeds of the mortgaged property.

An interesting and illustrative decision in this connection is *Rensselaer & Saratoga R. R. Co. v. Miller & Knapp*, 47 Vt. 146. The court held that, if the mortgage redemption moneys in question had been paid to the trustees instead of to the bondholders, they would have been entitled to the satisfaction therefrom of their proper compensation and expenses; and that the trustees could not be required, as prayed by the plaintiff, to satisfy their lien or part with their interest in the property until paid.

To the same effect, see *Miami Valley G. & F. Co. v. Mills*, 157 App. Div. (1st Dept.) 542.

We emphasize that Section 77(f) requires, as a part of the reorganization, the satisfaction of trustees' and other liens affected by the reorganization plan.

The *Rensselaer* case is quoted at length in *McLane v. P. & S. V. R. R. Co.*, 66 Cal. 606, 622; and the *Rensselaer* and *McLane* cases are the basis of the text in Jones on Bonds and Bond Securities (4th ed.), Section 1090. Various other decisions are the basis of the text in Perry on Trusts and Trustees (7th ed.), from which we quote the following:

“§907. The general rule is that the expenses of a trustee in the execution of the trust are a lien upon the estate, and he will not be compelled to part with the property until his disbursements are repaid.”

In Restatement of Trusts, Section 242, paragraph (3) of Comment, it is stated:

“The trustee . . . need not pay over principal without deducting the compensation to which he is

entitled with respect to the principal. To this extent the trustee has a security interest in the trust property for his compensation."

See also McClelland & Fisher on Corporate Mortgage Bond Issues, at 221.

With reference, generally, to the policy underlying the protection of trustees, see *Bissell v. Butterworth*, 97 Conn. 605.

In *Mersick v. Hartford & W. H. H. R. Co.*, 76 Conn. 11, the court reversed a judgment which distributed to the bondholders the proceeds of a sale of the mortgaged property without making provision for the claim of the trustee.

See also:

Chase National Bank v. Mobile & O. R. Co., 37 F. Supp. 453 (D. C. Ala.).

Smith's ex'x v. Washington City, V. M. & G. S. R. Co., 74 Va. 617.

Section 77 is a substitute for the method of realizing, after default, upon the mortgaged property through the foreclosure of the mortgage. Similarly, if a mortgage were past due, the redemption moneys would stand in place of the property. New securities (or cash) received by bondholders in a Section 77 proceeding are the equivalent of the foreclosure proceeds or redemption moneys payable to them, subject to the trustee's lien. In case of a redemption by payment in full, or in case of a foreclosure, the mortgage is satisfied by a satisfaction piece in the case of such a redemption or, in the case of a foreclosure, by the foreclosure decree, plus the decree confirming the sale, plus the special master's deed joined in by the mortgage

trustee and other parties. These methods are the equivalent of the provisions in Section 77 for the satisfaction of indentures and the conveyance of the mortgaged property.

Even assuming, therefore, that the Congress intended to pass an utterly unreasonable statute as above supposed, there can be no possible argument that the Congress intended that the bondholders should be relieved from payment to their trustee, from the proceeds of their security, for the services rendered on their behalf. As is stated above, the appropriate recourse of trustees is against the security or its proceeds.

See also *Fidelity Trust Co. v. Hutchinson Chemical & A. Co.*, 221 Fed. 63 (C.C.A. 8).

In the last-mentioned case the court held that, where the trustee performed its indenture duties—which consisted of the foreclosure of the mortgage in question—the trustee was entitled to reasonable compensation out of the entire proceeds of sale, including even the proceeds distributable to bondholders who objected to the trustee's action in foreclosing.

A reorganization plan results in a complete separation as between the debtor's estate on the one hand and the new securities (or cash) receivable by the bondholders on the other hand. An argument that the new securities (or cash) form a part of the debtor's estate would lack even plausibility. Payment out of the new securities (or cash) would not diminish in any way the assets of the debtor's estate or of the reorganized company; nor would it increase to any extent the obligations of the reorganized company inasmuch as such company would be totally unaffected by whether the bondholders retained all of their new securities (or cash) or paid some part thereof to their trustees.

Assuming, therefore, that a court below should determine that, upon the usual standard of compensation for services to bondholders, a trustee is entitled to compensation in excess of an amount limited by benefit to the debtor's estate, there is no good reason why the trustee, holding mortgaged assets which belong pro rata to the bondholders subject to the trustee's lien, should not be allowed to receive such compensation out of such assets rather than out of the new securities—unless this Court should be of the opinion that Section 77 prevents payment from the one source but not from the other, even though the effect is the same. In considering whether the Congress intended to prevent indenture trustees from obtaining "reasonable compensation", based upon the usual standards, out of mortgaged assets, we suggest that such a construction would be unreasonable in view of the various arguments contained in the respondent's brief, and also in view of the further fact that no restriction exists against the payment of such compensation out of the new securities. Therefore, this Court should hold that Section 77(c)(12) should be interpreted as urged by respondent.

If, however, this Court should not so hold, it should hold that reasonable compensation may be allowed by the courts below out of the new securities. We should regret the adoption of this alternative because we think that in practice it would be less desirable for bondholders than to have payment made out of the mortgaged property.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Dated, December 26, 1942.

Respectfully submitted,

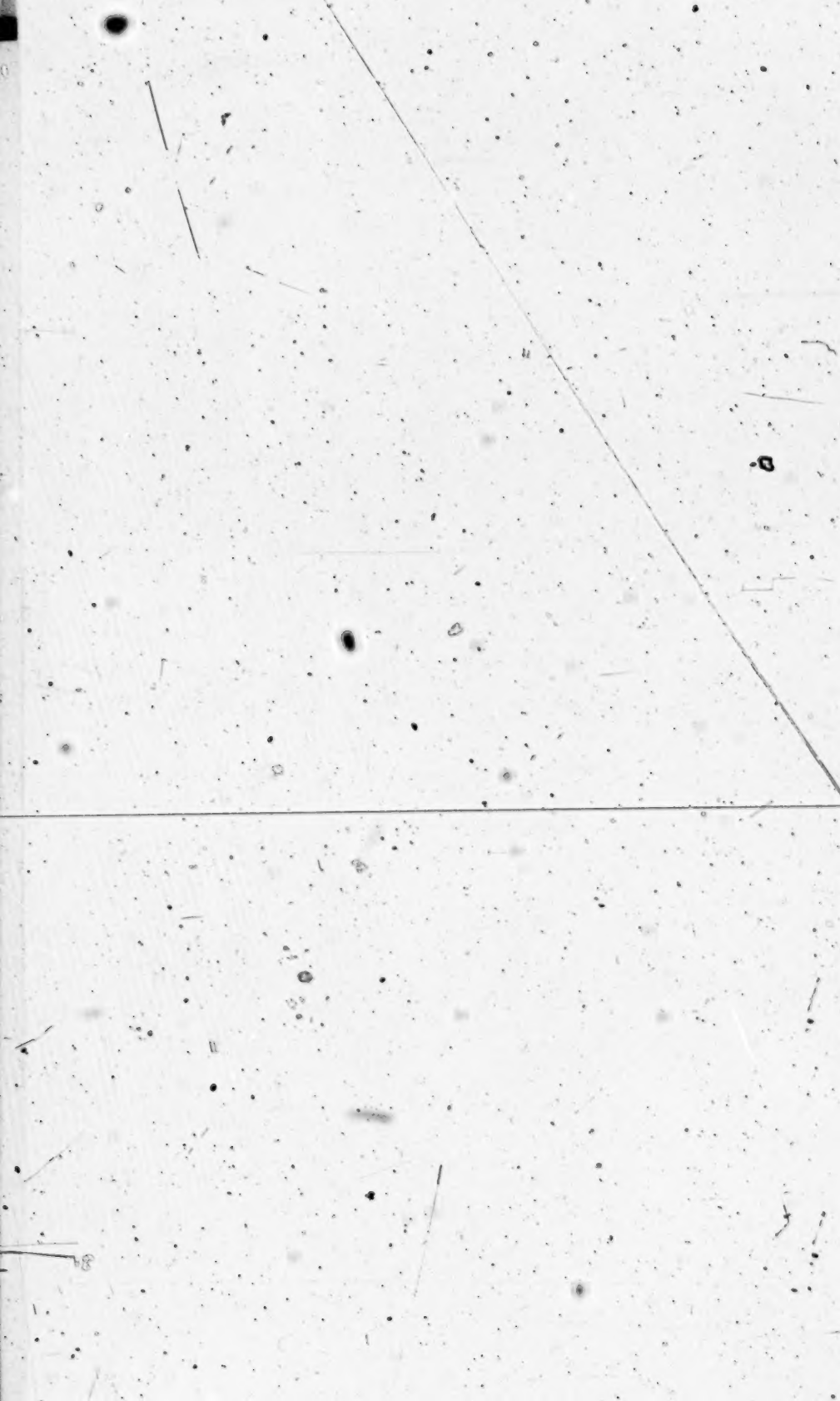
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CHARLES ELMORE CUMLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 387-368

RECONSTRUCTION FINANCE CORPORATION,

Petitioner,

v.

BANKERS TRUST COMPANY,

Trustee.

BRIEF OF AMICUS CURIAE

FRANK C. NICODEMUS, JR.,
40 Wall Street,
New York, N. Y.,
As Amicus Curiae.

Dated: December 19, 1942.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 387-388

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

v.

BANKERS TRUST COMPANY,
Trustee.

BRIEF OF AMICUS CURIAE

Statement

This brief is filed in the interest of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and The Denver and Rio Grande Western Railroad Company, for each of which the undersigned or the firm of which he is a member appears as one of the attorneys or counsel for the Debtor.

As already has been pointed out in the briefs filed in this Court on behalf of these companies in the two cases argued in this Court on October 13-15, 1942, it is the debtor, as distinguished from its trustees, creditors and stockholders, which is expressly charged with the responsibility of filing

and carrying through a Plan of Reorganization under Section 77 of the National Bankruptcy Act.

Referring to this responsibility in its more practical aspects, Judge PHILLIPS, speaking for the United States Circuit Court of Appeals for the Tenth Circuit in *The Denver and Rio Grande Western Railroad Company v. Wilson McCarthy and Henry Swan, Trustees* (111 F. (2d) 820) said:

"Undoubtedly, the debtor has important duties to perform in the reorganization proceedings, *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway*, 4 U. S. 648, 679, 55 S. Ct. 595, 79 L. Ed. 1110, and is entitled to the services of competent counsel to aid it in the performance of those duties and to have reasonable allowances made for the expenses incurred and the services rendered by such counsel, not only in connection with the formulation and presentation of the plan of the debtor but also in connection with the proceeding, the debtor having the right to be heard on all questions arising therein" (p. 823).

This brief will be directed generally to the proposition (which we understand is one of the major contentions of Bankers Trust Company, respondent, in the present case) that Paragraph 12 of Subsection (c) of Section 77 of the National Bankruptcy Act authorizing the Interstate Commerce Commission to prescribe maximum limits of expenses and compensation of the parties embraced therein was intended to apply only to those who participate in the proceeding as volunteers and should not be held applicable to a mortgage trustee having a paramount lien upon the trust estate assuring it just compensation, or to a debtor charged with the responsibilities summarized in the Opinion of Circuit Judge PHILLIPS in the case cited above. While the status of the debtor is not directly involved in the

present proceeding as presented on writs of certiorari issued to review a decision of the Circuit Court of Appeals in the Eighth Circuit affecting only the trustee under an indenture, a decision on the broad ground already stated would apply equally to the debtor; and it is assumed moreover that this Court may deem it appropriate to clarify Paragraph 12 to the extent that its true application is left in doubt by decisions already rendered by District Courts and various Circuit Courts of Appeal.

ARGUMENT

Paragraph 12 of Subsection (c) of Section 77 of the National Bankruptcy Act does not embrace or apply to the debtor either by its express terms or by Congressional intent but is limited in its application to parties in interest who seek recourse to the trust estate as a matter of grace and not as a matter of right.

In order that we may determine the correct application of Paragraph 12 of Subsection (c) of Section 77 of the National Bankruptcy Act in particular relation to parties such as the trustee of an indenture and the debtor itself who seeks recourse to the trust estate not as a matter of grace but as a matter of right, it will be helpful, we believe, first to trace this Paragraph to its source and then to analyze its provisions in the form in which it now appears.

In its earliest form this statute, being Clause 8 of Subsection (c) of the original Section 77 of the National Bankruptcy Act, as inserted by the Act of Congress approved March 3, 1933, read as follows:

“Upon approving the petition as properly filed the judge * * * (8) may, within such maximum limits

as are fixed by the Commission, as elsewhere provided in subdivision (f) of this section, allow reasonable compensation for services rendered and reimbursement for actual and necessary expenses incurred in connection with the proceeding and plan by officers, parties in interest, reorganization managers, and committees or other representatives of creditors or stockholders and the attorneys or agents of any of the foregoing, and by such assistants as the Commission with the approval of the judge may specially employ."

Subdivision (f) here referred to further provides:

"The Commission shall also, after hearing if necessary, fix maximum compensation and reimbursement which may be allowed by the Court pursuant to Clause (8) of Subdivision (c) of this Section: Provided, That unless good and sufficient reasons appear therefor no allowance for fees or compensation shall be made to officers of corporations who have acted as managers or in any capacity in connection with the reorganization when such corporation had an interest in the matter."

It is to be noted that Clause (8) does not mention either (a) the trustee under an indenture, or (b) the debtor, and does not definitely specify any person or corporation that would be an indispensable party to a proceeding in equity. *Quite clearly the debtor itself was not within the scope of this paragraph because under the statute in its then form the debtor was left in possession of its entire estate, the appointment of a trustee or trustees not being mandatory until the adoption of the amendatory Section 77, approved August 27, 1935.*

At all times during the life of the original Section 77 and in the early days of the amendatory Section 77, the practice was uniform among the carriers that had sought

relief under its provisions for the trustee or trustees, where one or more had been appointed, or the debtor itself where there was no trustee in the proceeding, to provide *currently* out of its trust estate (sometimes with, sometimes without, a special order of Court) *all* of the debtor's expenses (including compensation of its counsel) as the responsible moving party under the Section. These payments were shown in the monthly or periodic reports of disbursements and the practice was thoroughly understood in the summer of 1935, when Congress, acting very largely upon the recommendation of the Federal Coordinator of Railroads, himself a member of the Interstate Commerce Commission, radically revised Section 77. Certain changes were made in Clause (8) of Subsection (c), which as amended was carried into the new law as Paragraph 12 of Subsection (c) in the following language:

“(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceeding and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may

deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)."

It will be noted that the new Paragraph 12 includes a specific reference to "trustees under indentures."

The reason for this specific reference to "trustees under indentures" is not disclosed in the history of the legislation. As already mentioned the amendatory Section 77 approved August 27, 1935, was the outcome of recommendations made to Congress by the Federal Coordinator of Railroads. Accompanying these recommendations was a complete Bill which was introduced in the Senate as S-1634 by Senator Wheeler (by request) on February 4, 1935. Paragraph 12 of Subsection (c) of this Bill was substantially the same as Clause (8) of Subdivision (c) of the original Section 77 except that "depositories" are here for the first time specifically mentioned. Afterwards, this Bill was radically revised by the Coordinator and in its revised form was introduced in the House of Representatives on February 27, 1935, as H. R. 6249, by Chairman Sumners of the Judiciary Committee.

Paragraph 12 of Subsection (c) reappeared, however, in the same form as in S-1634.

On April 12, 1935, the Judiciary Committee circulated a revised print of H. R. 6249 which reflected many new changes proposed by the Coordinator. In this print, which is set out in full at pages 1-13 of the published record of the Hearing before the Committee on Judiciary, House of Representatives, Seventy-fourth Congress, on H. R. 6249,

Paragraph 12 of Subsection (c) for the first time brings in "trustees under indentures." Why this was done has not been made clear but it would be a harsh interpretation to say that Congress thereby intended for all purposes of Section 77 to destroy existing liens which such trustees might have upon specific property as security for their just compensation. The more reasonable construction would be that this language was inserted by the Coordinator (probably at the suggestion of trustee interests) to give such indenture trustees as had no lien on specific property or had a lien upon specific property which was without present value the right to receive their compensation out of the debtor's general estate subject to the conditions and limitations imposed with respect to other parties seeking recourse to the debtor's general estate as a matter of grace and not as a matter of right.

Congress did not, however, attempt to expand Paragraph 12 so as to bring the debtor itself within its scope, although the Coordinator did insert in the Committee print of H. R. 6249 the following provision:

"While the debtor is in possession its officers and counsel shall be entitled to receive only such compensation as the judge, within such maximum limits as the Commission shall approve as reasonable, shall from time to time approve and no person shall be appointed or elected to any such office, to fill a vacancy or otherwise, without the prior approval of the judge."

This provision was rejected by the House Judiciary Committee and eliminated from the Bill as finally reported to and passed by the House of Representatives.

Accordingly, under an established rule of statutory construction, the practice of providing currently out of the

debtor's trust estate all of the debtor's expenses as the moving party under Section 77 which had prevailed from the beginning was validated even if originally invalid, which we respectfully submit it was not. In *Case v. Los Angeles Lumber Company* (308 U. S. 106), Mr. Justice DOUGLAS, speaking for this Court, reasserted this rule in the following language:

"* * * Hence, as in case of other terms or phrases used in that section, *Duparquet Huot & Moncaise Co. v. Evans*, 297 U. S. 216, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. *Keck v. United States*, 172 U. S. 434, 446" (p. 115).

Manifestly, the Debtor could not perform its duties under either the original or the amended Section 77 without recourse to the trust estate for the heavy expenses necessarily entailed and which occur and recur at every stage of the proceeding; and the striking thing is that no one seemed to think otherwise during the first four years of operation under the statute, and no one seemed to think otherwise during the exhaustive consideration of every phase of the subject incident to the recommendation of the Federal Coordinator of Railroads embodied in the amendatory Section 77 approved August 27, 1935.

The first suggestion that the trustee might properly decline to provide for the debtor's expense came (as we understand) from the trustee of the Missouri Pacific Railroad Company some time in 1936, after more than \$200,000 had been provided by the same trustee in connection with various reorganization proposals sponsored by the late Messrs. Van Sweringen. A similar position was taken at or about the same time by the trustee of the Chicago and

Eastern Illinois Railroad Company. Although doubting the Commission's authority over the debtor, counsel for these debtors applied to the Commission to fix a maximum and this the Commission did. (*Missouri Pacific Railroad Company Reorganization*, 217 L. C. C. 397; *Chicago & Eastern Illinois Railway Company Reorganization*, 217 L. C. C. 497.) Later the District Judge for the District of Colorado inquired as to the Commission's interpretation of Paragraph 12 and under date of August 10, 1937, Chairman Meyer replied by forwarding its report in one of these cases and stating that the Commission's Division 4 believed that this Paragraph embraced the debtor, adding, however, "In certain of the reorganization proceedings the District Courts have, upon petition without reference to the Commission, authorized the expenditure by the debtors of funds for printing and for other purposes in connection with the preparation of plans of reorganization. In such instances, the Courts appear to have proceeded upon a theory at variance with the views of Division 4 as expressed in the attached report."

That Division 4 was wrong and the Courts were right as to the true understanding and intent of Congress is readily demonstrable by the legislative history of the Section.

Following the hearings held by the Judiciary Committee of the House of Representatives on H. R. 6249, Chairman Sumners introduced a new or substitute Bill which became H. R. 8587 and which reflected the changes desired by the Judiciary Committee in the pending H. R. 6249. On June 21, 1934, the Judiciary Committee reported this substitute Bill for favorable action by the House of Representatives (House of Representatives, Report No. 1283). Paragraph 12 of this substitute Bill was, so far as material, as follows:

"The judge may, within such maximum limits as are fixed by the Commission, allow a reasonable reimbursement, to be paid out of the debtor's estate, for the actual and reasonable expenses incurred in connection with the proceeding and plan by parties in interest, trustees under indentures, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and by such assistants as the Commission, with the approval of the judge, may specially employ."

In the Report of the Judiciary Committee we find the following reference to this provision (p. 8):

"It will be noted that no compensation under the final draft can be rendered for services rendered by the trustees, reorganization managers, committees, or their attorneys. All that is allowed is reimbursement for actual and reasonable expenses incurred. In other words, the debtor's estate shall be responsible for expenses but not for compensation for services rendered."

On August 15, 1935, the House of Representatives resolved itself into a committee of the whole for consideration of H. R. 8587. Chairman Sumners of the Judiciary Committee offered several amendments, one of which is the present Paragraph 12. In explaining this substitute Paragraph 12, Chairman Sumners said:

"A large percentage of the Committee felt that each class should pay their own attorneys' fees. The Chairman of the Committee shared in this view as an original proposition, but from my examination into the question and from the best technical advice we could get, the majority of the Committee became apprehensive that unless it was possible to pay some attorneys' fees from the estate, the small person in interest might not be represented, in view of the fact

that they have not been able to make satisfactory progress under existing law with reference to reorganization, and in view of the fact that the Railroad (Interstate Commerce) Commission would fix the total fees that could be allowed for reorganization and the Courts are given further power to check this, the Committee was afraid to take the responsibility to eliminate these fees, taking the position that we should let it run along awhile and see what will happen."

After replying to a question asked by one of the members of the House, Chairman Sumners continued:

"I say very candidly that if the Committee had felt the situation was not so critical with regard to the reorganization of these roads it very probably would have taken a chance on eliminating the fees, but it did not want to take the responsibility at the time" (Congressional Record, Vol. 79, Part 12, pp. 13298-13308).

The House Bill was sent to the Senate and was accepted by Chairman Wheeler of the Committee on Interstate Commerce as a substitute for its own Bill S-1634. The Interstate Commerce Committee reported this Bill favorably for action by the Senate in its Report No. 1336, 74th Congress, 1st Session. In this Report it is stated:

"Under the present provisions of Section 77, both compensation and expenses payable out of the debtor's estate may be allowed to officers, parties in interest, reorganization managers and committees or other representatives of creditors or stockholders and their attorneys, for services in connection with reorganization. These provisions are apt to induce many persons to attempt to participate in reorganizations with the hope of being compensated at the expense of the debtor and will tend to extravagance.

Consequently, S. 1634, as amended, provides that such parties may be paid only their expenses, compensation being eliminated, the allowances to be made by the Court within the maximum prescribed by the Commission."

But in transmitting this Report, Senator Wheeler, Chairman of the Interstate Commerce Committee, reported that the House of Representatives in H. R. 8587 had reversed itself and had concluded to allow compensation. The following is an excerpt from his statement to the Senate:

"The present provisions of Section 77 allow both expenses and fees to be paid to the designated interested parties out of the debtor's estate. This was regarded as an invitation to exploitation. The House Judiciary Committee consequently eliminated fees entirely, allowing only expenses. On further investigation, it found that this was too rigorous." (Congressional Record, Vol. 79, Part 13; pp. 13764-13769.)

This can leave no reasonable doubt in a judicial mind that Paragraph 12 was designed to cover the fees and allowances of volunteers and not of the debtor, whose expenses are an essential part of the proceeding. The fact that the Senate Committee on Interstate Commerce and the Judiciary Committee of the House of Representatives both considered entirely eliminating Paragraph 12 demonstrates that Congress could not have thought otherwise.

Those who have assumed that the debtor is subject to Paragraph 12 refer to the words "parties in interest" as being broad enough to describe and bring within its operation the debtor itself.

It must be remembered, however, that broad language such as this is subject to the restraint of legislative intent as determined by the context and by the statute as a whole.

As stated by Judge SUTHERLAND in his work on Statutory Construction (3376):

"Words or clauses may be enlarged or restricted to effectuate the intention or harmonize them with other express provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend but in what sense they were intended to be used as they are found in the Act."

This rule has been applied in the leading cases set forth in the subjoined footnote. In one of these cases—*Saginaw Broadcasting Co. v. Federal Communications Commission*—the Circuit Court of Appeals for the District of Columbia stated this rule as follows:

"It is an often quoted principle of statutory construction that the literal words of a statute are to be read in the light of the purpose of the statute taken as a whole, and that the literal meaning will not be followed when it appears that to do so would, in view of the purpose of the statute, lead to an absurd or unjust result."

Recapitulating in part what already has been said, we submit that there are at least five reasons, each sufficient in itself and each independent of the others, why the debtor is not a party in interest within the meaning of that phrase as used in Paragraph 12 of Subsection (c):

First: If the expert draftsmen who framed the Act had intended to include the debtor within the operation of Para-

Church of the Holy Trinity v. United States, 143 U. S. 457, 472;

Hawaii v. Mankichi, 190 U. S. 197, 212;

Ozawa v. United States, 260 U. S. 178, 194;

Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. (2d) 554, 558;

Donnelly Garment Co. v. International L. G. W. Union, 99 F. (2d) 309, 317.

graph 12 they would have named the debtor specifically as they did in the very next succeeding Paragraph 13.

Second: Section 77 in its original form left the debtor in possession of its entire estate subject to *no* restraint save such as might be imposed by the administrative court, and even under the amendatory Section 77 and specifically in Paragraph 12 recognition is given to the fact that the debtor continues until divested by final decree to be the beneficial owner of the trust estate.

Third: Unrestricted recourse to the trust estate, of which the debtor continues to be the beneficial owner, is the only resource available to the debtor to enable it to perform the important duties resting upon it by mandate of the statute, and the authority of the District Court having exclusive jurisdiction of the debtor's estate to require the Trustee to provide the debtor with funds necessary in the performance of these duties is part of its judicial power protected by the Constitution.

Fourth: The reports of Chairman Sumners of the Judiciary Committee of the House of Representatives, and Chairman Wheeler of the Interstate Commerce Committee of the Senate, presenting the amendatory Section 77, make it clear that Paragraph 12 was intended as a restraint upon volunteers and not those who are essential parties to the reorganization proceeding.

Fifth: The inclusion of the debtor in Paragraph 12 would render it unconstitutional or at least raises a grave question as to its constitutionality.

The basic constitutional objection to Paragraph 12 if construed to include the debtor is that as so construed it

confers upon the Interstate Commerce Commission an unreviewable judicial power which belongs to the Courts under the Constitution; because, as stated by Mr. Justice BUTLER, speaking for this Court in *United States v. New River Colliers Company* (262 U. S. 341):

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

Since under Paragraph 12 the judge is authorized to revise downward but not upward (no matter how inadequate) an allowance of compensation fixed by the Interstate Commerce Commission, we submit that this provision of the statute becomes unconstitutional unless, as seems quite clearly to have been the legislative intent, it is restricted in its application to parties who ask compensation for services rendered as volunteers and is held inapplicable to parties entitled as a definite legal right to payment out of the trust estate of just and reasonable compensation judicially ascertained and determined. Such parties are entitled to a determination which is purely judicial, and this Paragraph 12 does not even purport to give.

It may be true as held by Judge HINCKS in the matter of the reorganization of the New York, New Haven and Hartford Railroad Company (referred to in the brief of the Petitioner) that the District Court has power to withhold approval of a Plan certified to it by the Interstate Commerce Commission if it fails to provide for just and reasonable compensation to those entitled to it as a matter of right; but it is difficult to spell out of this theoretical power the provision of a judicial review sufficient to save Paragraph 12 as construed by the Interstate Commerce

Commission from constitutional infirmity. Such method of review is not a practical one. The injured parties themselves would hesitate to assert their constitutional right by asking the District Court to delay for months, perhaps for years, a vast financial readjustment closely and definitely related to the public interest. The Court would be equally reluctant to resort to such a method of review unless, as was the situation in which Judge HINCKS found himself, it should be necessary to disapprove the Plan for other reasons. Moreover, it would be patently unreasonable to assume that Congress ever intended that the District Court should be placed upon the horns of such a disturbing dilemma. So we come back to our fundamental contention that Paragraph 12 was intended to curtail largess but not to undermine contract obligations or property rights protected by the Fifth Amendment. To say the very least any other construction of Paragraph 12 would raise serious constitutional questions; and it is a traditional doctrine of this Court that in the interpretation of Congressional legislation grave constitutional questions are to be avoided. Mr. Chief Justice WHITE, speaking for this Court in *United States v. Delaware & Hudson Co.* (213 U. S. 366) stated this rule as follows:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity" (p. 407).

This doctrine applies with peculiar aptness in a case such as this where the statutory language is susceptible of an interpretation which will give effect to a reasonable legislative intent without at the same time approaching at all close to

the danger lines charted by well established principles of constitutional law. Agreeably to this rule, Paragraph 12 of Subsection (c) of Section 77 of the National Bankruptcy Act should, we submit, be construed as its language plainly requires as a *permissive* statute limited in its application to those parties who tender their aid in the hope of reward voluntarily granted and not extended to those who are indispensable parties to the proceeding and are participating therein in the performance of a duty which they cannot avoid. In many cases, of which the present case is illustrative, this would exclude the trustee of an indenture. *In all cases, however, it would exclude the debtor whose entire estate passes from its dominion and control upon the filing of a Petition under Section 77 but upon whom rests imperative duties which continue throughout the proceeding.*

It must be borne in mind, moreover, that in these Section 77 proceedings the Interstate Commerce Commission almost invariably becomes the proponent of the Plan of Reorganization which may (and in most cases does) place it in a position adverse to the debtor and not infrequently in a position adverse to the trustees under the junior mortgages. To give a non-judicial body such as the Interstate Commerce Commission the further power to deny its adversaries access to their own trust estate in resisting what may be (and ordinarily is) a confiscatory Plan of Reorganization affecting their vital interests is to create a situation repugnant to our ideals of fair play and to our traditional notions of elemental justice.

In its actual performance under its own interpretation of Paragraph 12, the Interstate Commerce Commission has not only seriously impaired the capacity of the debtor to perform its statutory functions but has at the same time

vastly increased the litigious strength of the Insurance Groups and the Savings Bank Groups which already was overwhelming and has accomplished precisely what Chairman Sumners stated the Judiciary Committee was seeking to avoid:

Let us show what the Interstate Commerce Commission has done and is doing by referring to certain of its own official records which are typical of many others.

We quote the following from the Report of Division 4, dated January 14, 1941, relating to the efforts of the Directors of the Chicago and North Western Railway Company to secure counsel to represent the debtor in the spring of 1940:

"At the meeting of the board on October 9, 1940, (error, the correct date is May 29, 1940) the committee of three presented a report of its further activities, including the task of employing counsel. One of the difficulties was that the committee had been unable to secure from individual members of the board of directors a personal guarantee of any counsel fees that might be incurred. Finally, after the committee had tendered employment to three separate attorneys or groups of attorneys, an acceptance was received from Luther M. Walter under date of May 28, 1940. Since June 10, 1940, when he was substituted for counsel who had formerly represented the debtor, Walter has acted and is now acting as counsel for the debtor in its reorganization proceedings" (242 I. C. C. 787, p. 791).

Counsel hesitated to accept a retainer to oppose a plan promulgated by the Interstate Commerce Commission if, as it asserted, it had the authority to say how much they would be paid or whether they would be paid at all.

That their reluctance was justified was soon made definite, and certain by the report of the Commission itself in

Chicago, Milwaukee, St. Paul and Pacific Railroad Company Reorganization (244 I. C. C. 445).

We quote briefly from the Report of Division 4 in that proceeding:

"Opposition to the debtor's petition for allowance of expenses of the appeal has been offered by the mutual savings bank group, the life-insurance group, and the Reconstruction Finance Corporation. The grounds of their objections are similar to those stated in the report of the Commission, by division 4, of January 14, 1941, in *Chicago & N. W. Ry. Co. Reorganization*, *supra*.

The Commission's decision in that case is controlling in the instant case.

Therefore, we conclude that so far as the petition relates to the fixing by us of a maximum limit of allowance we should deny the debtor's petition requesting the entry of an order authorizing and directing the debtor's trustees to expend funds of the trust estate for expenses and liabilities incurred and to be incurred by and on behalf of the debtor in preparing and presenting objections to the plan of reorganization certified by the Commission to the Court and in perfecting and prosecuting an appeal from the court's order approving that plan, such action to be without prejudice to renewal of the petition at such time as the debtor is prepared to show actual expenses incurred and the resulting benefit to the estate" (p. 448).

What the Interstate Commerce Commission means by "the resulting benefit to the estate" has not been made clear. Certainly it means something more in the Commission's mind than the orderly performance of necessary and proper service in the assertion of legal rights. It is perhaps significant that a member of Division 4 of the Inter-

state Commerce Commission appeared before the Judiciary Committee of the House of Representatives and urged that language to this effect be inserted in Paragraph 12 of Section (c) of the pending Bill, but the Judiciary Committee did not accept the suggestion.* If the Commission's theory is correct it would never be possible to show benefit to the trust estate resulting from an unsuccessful attack in the District Court upon a Plan of Reorganization certified to it by the Interstate Commerce Commission or resulting from an unsuccessful appeal from an order of a District Court confirming such a Plan. The practical result of this conception of Paragraph 12 is that the debtor cannot proceed as an active party after a Plan is certified to the Court unless counsel are willing to take the risk of losing all of their disbursements and of receiving no compensation if the Commission's Plan is confirmed by the Court. This, we submit, denies the debtor the day in court which is assured by the statute.**

The most extreme illustration of the practical application of the Commission's interpretation of Paragraph 12 is afforded by the case of *Chicago and N. W. Ry. Co.* (121 F. (2d) 791).

The Interstate Commerce Commission promulgated and certified to the District Court a plan of reorganization for Chicago and North Western Railway Company which entirely eliminated the equity represented by its capital stock.

* Hearings before the Committee on the Judiciary, House of Representatives, 74th Congress, on H. R. 6249 (pp. 69-70).

** The Commission declined to allow counsel to be reimbursed for the cost of printing the Record in the case of *The Denver and Rio Grande Western Railroad Company v. William McCarthy and Henry Spies, Trustees* (141 F. (2d) 828), because notwithstanding the illuminating opinion of Judge Phillips defining the rights of the debtor, there was a technical affirmation and the Commission could perceive no direct financial benefit to the debtor's estate (242 U.S. 639).

The debtor, after having at the eleventh hour, following three prior refusals, secured counsel willing to take the risk of representing it further in the proceeding, filed objections. The District Court approved the plan and the debtor appealed to the Circuit Court of Appeals. The debtor then applied to the District Court for an order directing the trustee appointed under Section 77 to provide the estimated cost of certifying and printing a transcript of the record. The District Court filed a memorandum stating that it thought it "desirable from the standpoint of the debtor and from the standpoint of everybody concerned *and from the standpoint of society* (our italics) that the judgment which has been rendered here be demonstrated to be fair and equitable, if it is; and if it is not it ought to be overturned," but assuming that it was without power to grant the debtor's application for funds to finance the appeal except within limits fixed by the Interstate Commerce Commission, the Court referred the application to the Interstate Commerce Commission to fix a maximum under Paragraph 12. The Interstate Commerce Commission, being unwilling to permit the trust estate to be resorted to to finance an appeal from an order of a District Court approving one of its certified plans, denied the petition for the fixation of a maximum "without prejudice to renewal of the petition at such time as the debtor is prepared to show actual expenses incurred *and the resulting benefit to the estate*" (our italics). The debtor then applied to the District Court in the alternative for two orders, one directing the Interstate Commerce Commission to fix a maximum and one directing the trustee to provide the funds regardless of the action or inaction of the Commission. The District Court denied both applications and the debtor appealed and secured from the Circuit Court of Appeals an order dispensing with a printed record in connection there-

with. The Circuit Court of Appeals heard both appeals, resolving itself into a three-judge court in respect of the appeal seeking to control the Commission's action. As a three-judge Court it affirmed the District Court but as the Circuit Court of Appeals it reversed the District Court in refusing to act independently of the Commission and remanded the proceeding "with directions to the District Court to hear and pass upon the petition of appellant."

The following brief excerpt from the opinion of the Circuit Court of Appeals, written by Judge EVANS, gives the gist of the Court's decision:

"(11) It is readily apparent why the Congress provided that the Commission should fix the maximum limit for compensation and expenses of attorneys and committees who rendered services before it, and left to the court full discretion in matters relating to appeals and all other matters concerning the value of which the Commission had no special knowledge. Equally persuasive with us is the fact that Congress would hardly have provided for the lodgment in the I. C. C. of authority to submit and adopt a plan of reorganization and, at the same time, place in the same body the power to prevent security holders whose rights were abrogated, from effectively prosecuting an appeal therefrom. Far more natural and logical would be the location of the power which permitted the District Court, which is not so directly responsible for the plan, to allow the stockholders who have lost their entire holdings in the company to prosecute an appeal and to authorize out of the debtor's estate, a payment of the printing bill on said appeal.

The last sentence of subsection (12) confirms this view. It provides that the 'Commission shall . . . after hearing, fix the maximum allowances which may be allowed by the court.' How could there be a hearing on the reasonableness of services not yet

rendered? This language contemplated only allowances for services or expenses that have been rendered, not for those which will be rendered.

The precise question is whether a court, having jurisdiction of the debtor, and to put into effect a plan of reorganization which eliminates all holders of the debtor's stock, may not authorize, for the purpose of testing the validity of the plan, the costs of printing the record on appeal, out of the debtor's estate.

In the absence of express statutory denial of authority, we hold that a court having the exclusive jurisdiction of the debtor and the debtor's estate, and having the power and jurisdiction of a court of bankruptcy and, also, of a court of equity in a suit where a receiver has been appointed, possesses that power.

(12) If subsection (12) does not limit the court's jurisdiction, then clearly there is no other statutory limitation of its powers. At most, subsection (12) is but an implied limitation on the court's power. It is not a limitation on the court's jurisdiction of the subject-matter. The limitation is in reference to services which *have been* rendered by the parties in interest and by committees or other representatives of creditors. The services therein referred to, *have been rendered*. For the greater part they were rendered by the parties before the I. C. C. They deal with services rendered and expenses incurred in submitting the plan of reorganization before the I. C. C. They do not refer to services to be performed or expenses to be incurred in the future. Of the necessity and reasonableness of future services and expenses, the trial court, rather than the I. C. C., is the best judge. Moreover, the jurisdiction is in the court, unless taken from it and placed in the I. C. C. by this subsection of the statute" (pp. 799, 800).

While this decision is sound and salutary as far as it goes, we respectfully suggest that it is unsound if it implies that Paragraph 12 authorizes the Interstate Commerce Commission at any stage of a proceeding under Section 77 to curtail the power of the Court to give a debtor recourse to its own trust estate in the protection of its own property rights.

It is just as essential for a debtor in the performance of its duties under Section 77 "to be represented by competent counsel" before the Interstate Commerce Commission "and to have reasonable allowances made for the expenses incurred, and the services rendered by such counsel" (we again quote from the opinion of Circuit Judge PHILLIPS in *The Denver and Rio Grande Western Railroad Company v. Wilson McCarthy, et al., supra*) as it is before the Court, and we think it quite beyond the Constitutional power of Congress to say that the judicial power of the Court having exclusive jurisdiction of the debtor's estate to assure this must be exercised in subordination to an administrative board such as the Interstate Commerce Commission.

The continuing duties resting upon the debtor under Section 77 involve a task recognized and described by this Court in the *Rock Island* case* as a task calling "for a degree of consideration and an extent of detailed work almost beyond the power of appreciation."

What Congress clearly intended was, we submit, not to empower an administrative board adversely interested to limit the activity and destroy the efficiency of the debtor in the performance of these duties and in the guardianship

* *Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and Pacific Railroad Company*, 294 U. S. 648.

of its own trust estate (at least half a dozen times in Section 77 the trust estate is referred to as "the debtor's estate") but was to safeguard and limit access to that estate on the part of self-constituted representatives of security holders, banker appointed committees and reorganization managers, and other types of *entre preneur* who may, as in the 1928 reorganization of the Chicago, Milwaukee and St. Paul Railway Company, seek to utilize the debtor's plight as an opportunity for early retirement to lives of leisure and affluence.

All of which is respectfully submitted for such consideration as this Court may deem appropriate.

December 19, 1942.

FRANK C. NICODEMUS, JR.,
40 Wall Street,
New York, N. Y.,
As Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

Nos. 387-388.—OCTOBER TERM, 1942.

Reconstruction Finance Corpora- tion, Petitioner, vs. Bankers Trust Company, Trustee.	} On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
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[February 8, 1943.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This controversy arises in a proceeding under § 77 of the Bankruptcy Act¹ for the reorganization of the St. Louis-San Francisco Railway Company system, part of which is the Kansas City, Fort Scott & Memphis Railway, under a mortgage of whose property the respondent Bankers Trust Company is trustee. The respondent obtained leave to intervene in the District Court and before the Interstate Commerce Commission,² and participated in the proceedings.

The Commission approved a plan of reorganization, and the District Court, with the plan before it, directed the filing of all petitions for allowance of "compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred either under clause (12) of subsection (c) of Section 77³ . . . or otherwise."

The respondent filed two such petitions, numbered respectively 266 and 267, each praying stated amounts as compensation for services as indenture trustee, for counsel fees, and for expenses. The sums named and the services recited in the two petitions were identical, but in 267 the compensation was claimed under § 77(c)(12), and the right was reserved to object to the jurisdiction of the Commission. That petition was sent by the court to the Commission for the fixing of a maximum allowance. Prior to the Commission's action thereon, 266 came on for hearing by the court.

¹ March 3, 1933, c. 204, 47 Stat. 1474, as amended; 11 U. S. C. § 205.

² Pursuant to § 77(e)(13); 11 U. S. C. § 205(e)(13).

³ 11 U. S. C. § 205(e)(12).

In 266, the respondent alleged that the services had "not been rendered or incurred 'in connection with the proceedings and plan'" for reorganization, but by respondent as trustee under the mortgage in performance of its fiduciary duties, for the benefit of the trust estate, as distinguished from the debtor's estate.

Over opposition by petitioner, a creditor and an intervenor, the court ruled that § 77(c) (12) did not apply, that the mortgage rendered the claim a proper charge on the mortgaged property, and directed the respondent to pay itself the amounts claimed out of cash deposited with it as indenture trustee.

The Commission held hearings on 267 and on other claims for allowances under § 77(c) (12). In a report it held that it had jurisdiction to fix a maximum amount to cover the items embraced in respondent's claim in 267, which it found were rendered in connection with the proceedings and the plan during the pendency of the § 77 proceeding.⁴ It fixed maxima below the amounts claimed for the several items of service and expense.

The court refrained from passing on this portion of the Commission's report. The petitioner appealed from the order in 266, and the Circuit Court of Appeals affirmed the judgment.⁵ "Due to the importance of the questions raised in the administration of the statute and a conflict of decision," we granted certiorari.

Section 77(c) (12), which appears in the margin,⁷ empowers the Commission to fix a maximum allowance "out of the debtor's estate" for the expenses (including attorneys' fees) and services

⁴ St. Louis-San Francisco Ry. Co. Reorganization, 249 I. C. C. 193, 218.

⁵ 129 F. 2d 122.

46 Fed. Supp. 236.

⁶ In re New York, N. H. & H. R. R. (D. C. Conn., #10,602, June 2, 1949).

⁷ "Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)."

of "trustees under indentures", for expenses incurred and services rendered "in connection with the proceedings and plan". It emphasizes that the expenses, the fees, and the services must be "reasonable" and the allowance therefor "reasonable". The court is to make the allowance "within such maximum limits as are fixed by the Commission".

The questions presented are: (1) does the subsection apply to the respondent's claims, and (2) if it does, is it valid? We answer both in the affirmative.

First. The respondent contends that the expenses and services for which compensation was allowed were not those referred to in § 77(c)(12). This, notwithstanding acquiescence in the holdings of the court below, which we think correct, that the term "debtor's estate" as used in the act embraces cash deposited with the indenture trustee and that the services and expenses in question were rendered and incurred "in connection with the proceedings and plan."⁸

The basis of the contention and of the decision below is that the services and expenses in question are "not within the meaning of" the subsection as the claim for their allowance is based upon the contract expressed in the mortgage⁹ and is for services required by the mortgage to be rendered the trust estate in fulfillment of the respondent's obligations.

The subsection applies in terms to allowance of claims such as those here in issue. No legislative history is cited to the contrary. The statute deals with other claims arising out of contract and secured by liens fixed or inchoate, and no basis is suggested for excluding the respondent's claim from its sweep.

Second. The main argument advanced in support of the judgment is that to apply § 77(c)(12) to the respondent's claims would violate the Fifth Amendment of the Constitution, by depriving the courts of power to determine whether the Commission's decision was contrary to law or without evidence to sup-

⁸ None of the services were routine administrative services currently rendered by the trustee; none were of non-routine character rendered prior to the inception of the reorganization proceeding. If they had been of these descriptions the petitioner concedes allowance for them would be a matter for the court under § 77(c)-11 U. S. C. 203(c).

⁹ Article Twenty-third of the Indenture: "The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

port it; and by destroying respondent's vested property rights. In addition, it is urged that by Art. III, Section 1, the judicial power of the United States is vested exclusively in the courts and matters of private right may not be relegated to administrative bodies for trial. The statute, fairly applied, in the circumstances disclosed by the record does not contravene any constitutional provision.

Three diverse conclusions respecting the effect of § 77(e)(12) have been expressed by the courts. It has been held that the maximum fixed by the Commission is in all circumstances binding and unalterable.¹⁰ The court below has concluded that the subsection has no application to the claims of an indenture trustee, secured by a lien on the trust estate pursuant to the mortgage contract. The District Court of Connecticut has decided that the court may set aside the maximum named by the Commission, if found unreasonably low, and return the matter to the Commission for a fresh determination.¹¹ The petitioner states its view that "while the statute is not entirely clear, judicial review of the maximum is permitted". After mentioning matters of law which are for the court's determination on review of the Commission's report, such as whether the services in question are to be compensated under the provisions of the Act; and others we need not mention, the petitioner refers to § 77(e)¹² which provides that the judge shall approve the plan if satisfied, *inter alia*, that the "amounts to be paid . . . for expenses and fees incident to the reorganization . . . are reasonable, [and] are within such maximum limits as fixed by the commission".

It is suggested that if the judge finds that any allowance within the maximum would be unreasonably low he may thereupon, under § 77(e), disapprove the plan and either dismiss the proceeding or refer the cause back to the Commission for further action.

None of these views seems to us rightly to construe the statute. We think the Congress did not intend to deny the courts all power of review of Commission action in such cases. The statute plainly

¹⁰ *In re Chicago, M., St. P. & P. R. Co.*, 121 F. 2d 371; *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230; *In re Chicago, G. W. R. Co.*, 29 F. Supp. 149. It is suggested this view is sustained by the legislative history of the section. But the changes made by amendment in another section (77e) are not helpful; and the testimony before the Judiciary Committee of the House is neither the sort of legislative material this court holds relevant to the construction of a statute, nor is it clear or definite upon the point at issue.

¹¹ *In re New York, N. H. & H. R. R.*, *supra*, note 6.

¹² 11 U. S. C. 205(e).

requires reference to the Commission of claims of the class under consideration, a hearing by that body, the setting of a maximum and action by the court on the footing of the Commission's report. It does not contemplate a hearing *de novo* on the issue of the reasonable worth of the services rendered or the propriety of the expenses incurred, or a reappraisal by the court of the facts. Moreover the procedure suggested by petitioner does not comport with the evident purpose of § 77(e)(12) which appears to treat the court's action with respect to such claims as a matter distinct from his final action on the plan as a whole under § 77(e).

Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not the court may so hold, set aside the finding and return the matter to the Commission. Under the terms of the subsection the judge's action upon the claim is subject to appeal independently of other issues, to the Circuit Court of Appeals.

Thus understood, we find no infirmity in the statute. The commitment to the Commission of the fact finding office raises no substantial question under the Fifth Amendment. In actions at law a jury is the traditional trier of facts, whose function as such is preserved and guaranteed by the fundamental law. But courts of equity, of admiralty and of bankruptcy, by themselves and their mandatories examine and decide disputed questions of fact; and no reason is perceived why claims of the sort here involved should not be litigated, as are other claims against bankrupt estates, by such machinery and in such manner as Congress shall prescribe, saving to the claimant the right of notice and hearing, and such review as is provided by the statute as we construe it.

At law the jury's verdict settles issues of fact and defines rights, subject only to questions of law. In administrative procedure, the findings of the administrative body may likewise be made conclusive of fact issues, and equally define rights and duties subject only to questions of law. No question is made as to the competency of the Interstate Commerce Commission to appraise evidence and to draw an informed and intelligent conclusion as to

what is a maximum reasonable compensation for services rendered. Indeed, since most of the services are performed in connection with its activities it is probably in a better position to judge of their value to the reorganization than any court or other fact finding instrumentality.

To prescribe a method of trial of facts, subject to a court's supervision in matters of law, is not, as respondent suggests, to destroy vested rights, but to provide a method of appraising and liquidating them. The statute awards the claim priority of payment, so that respondent is not called upon, as are some other classes of creditors, to suffer an abatement of its claim.

The judgment is reversed and the cause remanded to the District Court with instructions to proceed in conformity with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES.

Nos. 387 and 388.—OCTOBER TERM, 1942.

Reconstruction Finance Corporation,
Petitioner,

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vs.

Bankers Trust Company, Trustee.

Reconstruction Finance Corporation,
Petitioner,

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vs.

Bankers Trust Company, Trustee.

On Writs of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Eighth Circuit.

[February 8, 1943.]

Mr. Justice DOUGLAS, concurring.

While I concur in the result and in most of the opinion of the Court, I am in disagreement with the majority on one phase of the case.

I do not think that the maximum allowance made by the Commission for fees and expenses is subject to review by the District Court. Sec. 77(e) (2) now provides that the judge shall approve the plan if satisfied that the amounts to be paid for fees and expenses have been disclosed, "are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge". Prior to the 1935 amendments to § 77, that provision, then contained in subsection (g) (2) read differently. Though subsection (f) then stated that the Commission had to "fix the maximum compensation and reimbursement" which might be allowed by the court, subsection (g) (2) provided for approval of the plan by the judge if he was satisfied that all such amounts "have been fully disclosed and are reasonable, or are to be subject to the approval of the judge". The changes made by the 1935 amendments are significant. The total amount of fees and expenses fixed by the Commission became a ceiling beneath which the judge could make readjustments but above which he could not go. Prior to those amendments judicial review of the maximum fixed by the Commission might have been permissible. But the changes made in

1935 clearly indicate, as Judge Evans said in *In re Chicago, M. & P. & P. R. Co.*, 121 F. 2d 371, 374, that the "court was ultimately to determine the amount of the fee", its action however being "limited by the maximum fixed by the Commission." The legislative history of the 1935 amendments supports that view.¹ Indeed the Committee Reports state² that the "allowances to be made by the court" were to be "within the maximum prescribed by the Commission." H. Rep. No. 1283, 74th Cong., 1st Sess., p. 3; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 4.

That construction also squares with other provisions of § 17. Thus subsection (c)(12) provides that the Judge may make an allowance "within such maximum limits as are fixed by the Commission." It also requires the Commission to "fix the maximum

¹ The testimony of Mr. Craven, the draftsman of the bill, is illuminating:

"Mr. Burgess. That is the provision of this act that the maximum is to be approved by the Commission. The objection that I was making was directed to Commissioner Mahaffie's addition to that. It seems to me that the provision for the appeal is adequate. I am not sure whether that maximum is appealable. Are you, Mr. Craven? That is, can the fixation of a maximum by the Commission be appealed under this act?"

Mr. Craven. I think not.

Mr. Burgess. You think not?

Mr. Craven. That is my recollection of it.

Mr. Oliver. Even if the court would accept the maximum there would be no appeal from the court's ruling?

Mr. Burgess. I do not know of any appeal that you can take from the Commission's fixation of a maximum under this act.

Mr. Oliver. That does not seem right.

Mr. Burgess. That (sic) is an appeal from the court's fixation, of course, but that would have to be within the maximum, so I do not know of any appeal.

Mr. Michener. There are a number of powers from which you cannot appeal so far as the decision of the Commission is concerned. They are really given more power to some particular than the judge.

Mr. Oliver. That leaves the entire matter in the hands of the Interstate Commerce Commission, practically speaking.

Mr. Michener. Yes.

Mr. Burgess. Yes.

Mr. Oliver. With no right of appeal at all if the maximum is accepted by the court?

Mr. Burgess. That is my understanding. If Mr. Craven has a different view, I should be glad to accept his view.

Mr. Craven. That is my understanding of it."

Hearings on H. R. 6249, House Committee on the Judiciary, 74th Cong., 1st Sess., Ser. 2, p. 66. And see the testimony of Commissioner Mahaffie at p. 70 which is also quoted in *In re Chicago, M. & P. & P. R. Co.*, *supra*, p. 374.

² The committee print of the bill provided for allowance of expenses and of compensation. See subsections (c)(12) and (c)(2) of H. R. 6249, 74th Cong., 1st Sess., Hearings on H. R. 6249, *supra*, pp. 6, 7. As recommended by both the House and Senate committees, allowances for expenses but not for compensation were provided. The provision for allowance of fees was later restored. 79 Cong. Rec., 74th Cong., 1st Sess., p. 13765.

allowances which may be allowed by the court". They indicate to me that in line with the minority view in *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, which § 77 adopted (see Congressman La Guardia, 76th Cong. Rec., 72nd Cong., 3d Sess., p. 5356), the drain on the cash resources of railroads was to be controlled by entrusting to the Commission the responsibility for determining the total amount of cash which should be expended for fees and expenses. Within those limits the courts could make a fair allocation among the various claimants. But beyond those limits the courts could not go. There might of course be questions of law affecting the aggregate maximum allowances made by the Commission which the District Court could review. Thus, if in this case the Commission had held that the services rendered by respondent were not within the scope of § 77(c)(12), that ruling could be reviewed and the matter would then have to be remanded to the Commission for a new determination. § 77(e). But apart from such instances, the Commission's finding as to the aggregate maximum allowances is conclusive.

It is of course the duty of the Commission not only to fix the maximum amount of the aggregate allowances for fees and expenses but also to determine in the first instance how much each claimant should receive. That is made evident not only by subsection (c)(12) but also, by subsection (d) which requires the Commission in its approval of a plan to find that it meets the requirements of subsections (b) and (c). The latter, as has been noted, requires that the amounts to be paid by the debtor or the reorganized company for expenses and fees be "reasonable" as well as "within such maximum limits as are fixed by the Commission". Since the main services rendered in connection with a plan of reorganization under § 77 occur before the Commission, it is in a much better position than the District Court to determine the value, if any, of the services rendered by each claimant. That fact gives great weight to the findings made by the Commission on each claim. But the requirement in subsection (e)(2) that the judge find that the awards are "reasonable" negatives the idea that the findings of the Commission are conclusive. Hence within the maximum limits of the total allowances for fees and expenses the judge can make readjustments—increasing or decreasing amounts awarded to the various claimants or granting allowances where none were made by the Commission. The contrary view was adopted in *In re Chicago, M., St. P. & P. R. Co.*, *supra*.

pp. 374-375. The court felt that since subsection (e)(12) spoke of the "maximum limits" and "maximum allowances" fixed by the Commission, the findings of the Commission as to the maximum amount which each claimant could receive were conclusive. But that interpretation is difficult to reconcile with the requirement of subsection (e)(2) that the judge must find the allowances "reasonable". The use of the plural in subsection (e)(12) only indicates that the maximum allowance for fees and the maximum allowance for expenses are both to be fixed by the Commission.

My conclusion that the aggregate maximum allowances fixed by the Commission is not reviewable does not make § 77(e)(12) and (e)(2) unconstitutional. It is Congress which has the power under the Constitution to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Article I, Sec. 8, Cl. 4. The scope of the bankruptcy power is not restricted to that which has been exercised. *Continental Bank v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 670-671. The fact that Congress has customarily entrusted administration of the various bankruptcy acts to the courts does not mean that it must do so. As stated by Judge Evans in *In re Chicago, M., St. P. & P. R. Co.*, *supra*, p. 375, "the power of Congress to deal with bankruptcy carries with it the right to select the tribunal, even going outside of courts, to administer debtors' estates." When it comes to fees for services rendered or expenses incurred in connection with bankruptcy proceedings, Congress has plenary power. In § 48 of the general bankruptcy Act Congress has prescribed the schedule of fees for receivers, marshals, and trustees. It could provide that no fees for services rendered during the bankruptcy proceedings might be paid from the estate. The 1935 amendments to § 77 originally were recommended by the committee on that basis. H. Rep. No. 1283, *supra*, p. 3; S. Rep. No. 1336, *supra*, p. 4. Having that power Congress could fix fees for attorneys and others on a *per diem* or other basis. Cf. *Hines v. Laregy*, 305 U. S. 85. In lieu of any such rigid system of control it could bring to its aid the services of the Commission and vest in it complete authority over all allowances. That clearly would not involve any question of delegation of judicial power. See *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 400. Hence, when Congress granted the Commission exclusive authority over the maximum amount of allowances, it did not give § 77 a constitutional infirmity.

Mr. Justice BLACK joins in this opinion.